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SUPREME COURT, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1991

JADER FUEL COMPANY, INC.,
Petitioner,

v.

BILLIE WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 9, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Did the seventh circuit misconstrue Illinois law by reversing the trial judge's decision to take the issue of punitive damages away from the jury, when the effect will be to substantially reverse the trend in Illinois away from punitive damages?

2. Did the seventh circuit improperly interpret Illinois law when it reversed the trial judge's directed verdict in favor of Petitioner on the contract claim, when the directed verdict was based on the finding that a clear and unequivocal written contract right defeated Williams' claim of a breach of good faith and fair dealing?

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Petitioner, Jader Fuel Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 1, 1991 and denial of rehearing on January 10, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Williams v. Jader Fuel Company, Inc.*, 944 F.2d 1388 (7th Cir. 1991) and is reprinted in the Appendix, p. 1. The Seventh Circuit's denial of the Petitions for Rehearing is reprinted in the Appendix, p. 34.

The decision of the United States District Court for the Southern District of Illinois reviewed by the Seventh Circuit was not reported. The judgment entered by the District Court on December 21, 1989, is reprinted in the Appendix, pp. 39-40.

The District Court's Rulings on Count I (contract claim) and Count III (punitive damages claim) are reprinted in the Appendix, pp. 41-50.

STATEMENT OF JURISDICTION

The Seventh Circuit decided this case on October 1, 1991. The Petition for Rehearing filed by Respondent and Suggestion for Rehearing *In Banc* filed by Petitioner were denied on January 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTORY AND OTHER AUTHORITIES

The Seventh Circuit's decision involved an interpretation of Illinois state law. There are no constitutional or statutory provisions involved.

STATEMENT OF THE CASE

On December 1, 1981, the Petitioner, Jader Fuel Company, Inc.[1] ("Jader"), entered into a contract mining agreement ("Agreement"), with Lovilia Coal Company ("Lovilia"). The Agreement provided that Lovilia could mine, through underground mining methods, the number five coal seam underlying a tract of land known as the "Green Lease." (Tr. 108-09, App. 51). The Agreement also contained a clause granting Jader "the absolute and sole right to mine by surface or strip or auger mining methods any and all seams of coal on any of the lands covered by [the] agreement, or on any additional lands which Jader [later acquired]." (App. 53).

Pursuant to the contract, until the spring of 1985 Lovilia mined in various areas including a portion of a tract of land known as the Shawnee National Forest Property ("Shawnee tract") (Tr. 259-60). In March, 1985, Lovilia experienced prob-

1. Pursuant to Supreme Court Rule 29(1), Petitioner states that there is no parent or subsidiary company.

lems and was forced to lay off all of its employees (Tr. 177). Thereafter, Lovilia never resumed underground mining operations (Tr. 114-160). Although a mine manager and two mechanics occasionally checked the underground mine's condition (Tr. 114-16), Lovilia could not pay its employees (Tr. 100). Lovilia owed $700,000 to the Gallatin County State Bank, $995,000 to other creditors and $120,000 in taxes and wages for a total of $1.8 million in liabilities (Tr. 100-01, 639-40). It attempted without success to obtain a $1.2 million loan throughout 1984 and 1985 (Tr. 502-04, 554-55).

In September, 1984, Jader received a permit from the State of Illinois allowing it to conduct surface mining on the Shawnee tract (Tr. 271). Pursuant to the Agreement between Jader and Lovilia, Lovilia possessed a right of first refusal to mine the underground coal on the Shawnee tract in the event Jader agreed to allow such mining (App. 57-58). Lovilia, through its partners, testified that they received oral permission to mine the Shawnee tract in the summer of 1982 (Tr. 64, 65 & 111), but the officers of Jader denied ever giving such oral permission (Tr. 254, 255 & 295).

The state permit allowing Jader to mine the Shawnee tract contained several provisions dealing with the management of mine openings of old works of underground mines (Tr. 265-66). The final permit provided that mine openings were to be sealed by compacting underground material around the openings (Tr. 267). During the permit process, the State mining inspector reviewed the problem of surface mining over the abandoned area of the active Lovilia mine. He stated in a letter, which became an attachment to the permit, that the mining was being done over the abandoned areas of the Lovilia mine and he saw no problems with the safety involved in that operation (Tr. 271).

On or about August 6, 1985, over four months after Lovilia had laid off all of its employees and ceased mining operations, Jader cut into a portion of the Lovilia underground mine while

conducting strip mining activities (Tr. 320-22). Jader subsequently sealed the openings with ten feet of fire clay, which was compacted by a bulldozer as required by the state permit (Tr. 320-22).

Approximately one month later, on September 6 and 7, 1985, a four and one-half inch rain struck Southern Illinois. The power to the underground mine was knocked out by the storm, resulting in a failure of the pumps in the Lovilia mine. When power was finally restored on September 7th, the underground mine had completely flooded (Tr. 200-202).

Proceedings in the District Court

The Respondent, Billie Williams (a Lovilia partner), brought suit against Jader alleging breach of contract, negligence, wilful and wanton conduct (punitive damages) and trespass (App. 6). The jurisdiction of the district court was based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The district court granted directed verdicts in favor of Jader on all counts except the negligence claim (App. 45, 50). The jury returned a verdict in favor of Williams on the negligence count, assessing total damages in the amount of $365,000. The jury also found Williams thirty percent contributorily negligent. This reduced the award to $255,500 (App. 39-40).

Seventh Circuit Reverses

The seventh circuit reversed in part finding that the district court improperly directed a verdict in favor of Jader on the breach of contract and punitive damages counts. (App. 7-16). The court affirmed the directed verdicts on the trespass counts, and remanded for a new trial on the negligence claim (App. 16-18, 33).

ARGUMENT

I. THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION IN TAKING THE ISSUE OF PUNITIVE DAMAGES AWAY FROM THE JURY.

A. *The Trial Judge's Decision On Punitive Damages Should Not Be Disturbed Absent An Abuse Of Discretion.*

Illinois courts have consistently given trial judges considerable discretion in determining whether the facts of a particular case justify an award of punitive damages. *See, e.g., Motsch v. Pine Roofing Co.*, 178 Ill. App. 3d 169, 177, 533 N.E.2d 1, 6 (1st Dist. 1988); *Queen v. Behm*, 58 Ill. App. 3d 253, 255, 373 N.E.2d 1382, 1383 (2d Dist. 1978). The preliminary question of whether the facts of a particular case justify punitive damages has long been a question for the trial judge. *Kelsey v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 359 (1979).

Despite this well developed case law, the seventh circuit determined that the proper standard of review on the punitive damages count involved "viewing the record in the light most favorable to the Plaintiff." (App. 14). The court interpreted the Illinois Supreme Court's recent decision in *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397 (1990), to indicate an intention by the Illinois Supreme Court to apply a stricter standard of review to the initial decision of a trial judge as to whether punitive damages are warranted (App. 13-14). It is respectfully submitted that the seventh circuit's reading of *Loitz* threatens to destroy the continued trend in Illinois away from punitive damages *and is not what the court intended in Loitz.*

In *Loitz*, the plaintiff brought an action against a shotgun manufacturer after the barrel of the shotgun he was using exploded. The jury returned a substantial award of punitive damages ($1.6 million), but the Illinois Supreme Court reversed. *Loitz*, 138 Ill. 2d 404, 430, 563 N.E.2d 397, 408. Although the trial judge and the intermediate appellate court had found

that sufficient facts existed to justify the jury's award, the Illinois Supreme Court, reviewing the same evidence, held that an award of punitive damages was improper. *Id.* at 426, 563 N.E.2d at 407.

The *Loitz* court was *not* reviewing a trial judge's initial decision as to whether punitive damages were appropriate. In *Loitz* the issue had already been submitted to the jury and the jury returned a substantial award of punitive damages. *Loitz*, 138 Ill. 2d at 412-13, 563 N.E.2d at 401. At no time did the *Loitz* court address the issue of which standard of review should apply to an *initial* decision of a trial judge to deny punitive damages. In fact, the court intimated that the *initial* decision is within the discretion of the trial judge. As the court put it, "appropriately enough, the *initial* decision whether punitive damages may be imposed in a particular case . . . *is a matter normally reserved to the trial judge*." *Id.* at 414, 563 N.E.2d at 401 (emphasis added).

The seventh circuit acknowledged that decisions prior to *Loitz* had held that a trial judge's initial determination on punitive damages should not be disturbed absent an abuse of discretion (App. 13). It is worthy of note that the *Loitz* court did not question or criticize these earlier appellate court decisions, nor did the court address the specific issue of the degree of discretion to be given to a trial judge's determination.

By changing the standard of review, the seventh circuit substantially reverses Illinois' continuing trend away from punitive damage awards. The *Loitz* court made it quite clear that Illinois, like most states, continues to place greater restrictions on punitive damage awards. *Loitz*, 138 Ill. 2d at 404-05, 563 N.E.2d at 402-03. The court discussed at length the problems posed by such awards, noting that the "broad range of circumstances that may be taken into account by a jury in making a punitive damage award often invites imposition of a large sum unrelated to the injury incurred." *Id.* Clearly, the intent of the *Loitz* court in reversing the $1.6 million award was to reem-

phasize the continuing trend in Illinois away from punitive damage awards. To construe *Loitz* to mean that trial judges must always view the evidence in the light most favorable to the party seeking punitive damages is simply an incorrect interpretation of the court's analysis.

Finally, the standard applied by the seventh circuit conflicts with the court's earlier decision in *Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035 (7th Cir. 1990). In *Ampat*, the seventh circuit affirmed a trial judge's decision to set aside a substantial punitive damages award, finding that the judge's decision was proper "given the broad discretionary character of the Illinois standard." *Id.* at 1043. Apparently the seventh circuit is now overruling its earlier decision in *Ampat*, in favor of a more restrictive standard of review. It is respectfully submitted that this court should issue a Writ of Certiorari to reevaluate the seventh circuit's interpretation of *Loitz* and resolve the apparent conflict between *Ampat* and the instant case.

B. *The Trial Judge Properly Exercised His Discretion In Determining That Punitive Damages Were Inappropriate.*

The seventh circuit determined that the issue of punitive damages should have gone to the jury because Jader's mining superintendent, Ed Downen, knew of the location of plaintiff's underground mine when Jader made its cuts on the Shawnee tract (App. 15). Throughout this appeal, Respondent Williams has emphasized that evidence existed to support a finding that Jader "intentionally" cut into the underground works (Respondent's Brief, 24-28; Reply Brief, 5). The problem with this argument is that it fails to point to evidence which would support an award of punitive damages. The proper inquiry is whether Jader had the requisite state of mind to bring about the "consequences" of the act - the flooding of the mine. *See* Prosser, *Prosser & Keeton on Torts* § 8, p. 34 (5th ed. 1984).

This is not a case where Jader intentionally poured water into Lovilia's underground mine. On the contrary, Jader was mining in an area where it clearly had a right to be pursuant to the Agreement. Jader retained "the absolute and sole right to mine" in the area where the cuts occurred (App. 53). After the cuts were made, Jader filled in the areas with fire clay as required by the permit issued by the state (Tr. 264- 66, 303, 320-22). The actual flooding did not take place until many weeks later, long after Jader had filled in the cuts with fireclay (Tr. 303, 320-22). It was only after three days of heavy rains (a four and one half inch (4 1/2") downpour) in September, 1985, that the flooding took place (Tr. 200-202).

One of the few unbiased witnesses at trial made it quite clear that the state permit allowed for exactly what was done by Jader. Bradley Evilsizer, director of the Illinois Department of Mines and Minerals, testified that the permit allowed Jader to cut into the inactive portions of the Lovilia underground mine if encountered (Tr. 361). If Jader did not adequately fill in the cuts then Jader was guilty, at worst, of negligence. Such activity, although arguably supportive of a negligence award, is insufficient to support an award of punitive damages.

Based on the evidence presented, the trial judge properly exercised his discretion in taking the issue of punitive damages away from the jury. It is therefore respectfully requested that this court issue a Writ of Certiorari to reconsider the seventh circuit's decision allowing the issue of punitive damages to go to the jury.

II. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT FOR JADER ON WILLIAMS' CONTRACT CLAIM

Count I of Williams' complaint alleged that Jader breached an implied covenant of good faith and fair dealing by mining in the #5 coal seam where the plaintiff had previously mined (App. 7). As noted by the seventh circuit, Illinois law

provides that the covenant of good faith and fair dealing is not an independent source of duties assumed by parties to a contract, and a breach of the covenant does not by itself create an independent cause of action (App. 8). Rather, the covenant "is in aid and furtherance of other terms of the agreement of the parties." *Gordon v. Matthew Bender & Co.*, 562 F.Supp. 1286, 1290 (N.D. Ill 1983); App. 8. Under Illinois law, no obligation can be implied which would be inconsistent with the explicit terms of the Agreement. *Id.* at 1288-90; App. 9.

The seventh circuit, in reversing the district court's decision, held that by cutting into Lovilia's underground tunnel Jader arguably improperly exercised its discretion and therefore could have been found to have acted in bad faith (App. 11). The problem with this analysis is that it imposes an obligation on Jader which is clearly inconsistent with the explicit terms of the Agreement. It is undisputed that Jader retained the absolute right to mine in the area in question (App. 53). If the covenant of good faith and fair dealing defeats that right, the tail wags the dog, and the nebulous covenant is of more importance than the clear contract right.

The district court's ruling was fully in accord with the rule that the covenant of good faith and fair dealing cannot be destructive of or inconsistent with a clear contractual right. *Gordon*, 562 F.Supp. 1286, 1290 (N.D. Ill. 1983). Jader had the clear contractual right to do the strip mining, which cannot be defeated by the doctrine of good faith and fair dealing. This court should accept this case for review to examine the seventh circuit's reversal of the district court's directed verdict on the contract claim.

CONCLUSION

Petitioner, Jader Fuel Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled proceedings on October 1, 1991, and the denial of the petitions for rehearing on January 10, 1992.

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April 9, 1992

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-2333

BILLIE WILLIAMS,

Plaintiff-Appellant,

v.

JADER FUEL COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 89-C-5193—**William L. Beatty**, *Judge.*

ARGUED JUNE 7, 1991—DECIDED OCTOBER 1, 1991

Before COFFEY, FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff Billie Williams was the part owner of Lovilia Coal Company. In 1981, Lovilia entered into a contract with defendant Jader Fuels, like Lovilia a coal-mining concern. Under the contract, Lovilia was allowed to mine by sub-surface methods on certain land leased by Jader. Lovilia mined beyond the boundaries of the tract identified in the agreement, and began to tunnel under an adjacent piece of land, also leased by Jader. Jader began strip mining on the second tract, and Jader's strip mine cut into Lovilia's sub-surface mine, causing flooding which damaged mining equipment owned by Lovilia and made continued operation of its mine impossible. Williams sued Jader, claiming that Jader had

breached the covenant of good faith and fair dealing implicit in their agreement, that Jader was negligent or willful in strip-mining through Lovilia's sub-surface mine, and that Jader trespassed upon Lovilia's sub-surface mine. The district court granted Jader a directed verdict on all counts except negligence. The jury found in favor of Williams on the negligence issue, but found that the company he part-owned, Lovilia, was thirty percent contributorily negligent. Williams appeals, challenging the district court's grant of directed verdicts on the contract claim, the willfulness claim, and the trespass claims. He also challenges the district court's refusal to strike several affirmative defenses tendered by Jader, as well as a number of evidentiary rulings. We affirm in part, reverse in part, vacate in part, and remand for a new trial.

I. FACTS AND PRIOR PROCEEDINGS

This is a tale of two mines. Before 1981, defendant Jader Fuel Company ("Jader") obtained the right to mine coal located on land owned by the Green family in Gallatin County, Illinois ("the Green tract"). On December 1, 1981, Jader entered into an agreement with Lovilia Coal Company ("Lovilia"), a partnership owned by Tommy Wignall and plaintiff Billie Williams. Under the agreement, Jader gave Lovilia the exclusive right to mine, by sub-surface methods, two seams of coal that ran under the Green tract. Lovilia agreed to mine these seams "on a continuing and continuous basis," until the seams "shall have been completely mined." Contract Mining Agreement ("Agreement"), ¶ 6. Jader agreed to market the coal Lovilia extracted from these seams, and to pay Lovilia seventy percent of the sales price it received from coal buyers. Jader retained the right to strip mine on the Green tract.

The Agreement between Jader and Lovilia also contained terms relating to a second tract of land. This land ("the Shawnee tract") was located in an area of Shawnee National Forest which bordered the Green tract to the west. At the time the parties entered into the Agreement,

Jader had not yet acquired mining rights to the Shawnee tract, but contemplated that it soon would. Jader granted Lovilia a right of first refusal on the opportunity to mine by sub-surface methods on the Shawnee tract. However, the parties agreed that Lovilia could not mine past the border between the Green tract and the Shawnee tract unless Jader allowed it to do so. Although the contract provision concerning the possibility that Jader would allow Lovilia to mine the Shawnee tract did not specifically require that Jader give its assent to Lovilia in writing, the Agreement specified that "[a]ny and all notices provided for herein shall be in writing." Agreement, ¶ 13. The Agreement also contained a merger clause stating that it represented the only agreement between the parties, as well as a clause that required all modifications to be in writing. *Id.*, ¶ 18. The parties agreed that the Agreement would terminate if Lovilia failed to mine coal for six successive months.

By April 1982 Lovilia had dug its mine and was removing coal from the Green tract. At some point in 1982, Lovilia began to tunnel to the west, along one of the two seams of coal it was allowed to mine under the Agreement. In the summer of 1982, Williams' partner Tommy Wignall attended a meeting with two Jader employees, mining engineer Gary Carr and mine superintendent Ed Downen. At trial, Wignall testified that Carr and Downen told him that Jader had acquired the right to mine the Shawnee tract, and that Lovilia was free to extend its mine tunnel west across the boundary between the Green tract and the Shawnee tract. Lovilia availed itself of this opportunity, following one of the seams of coal it was permitted to mine across the western border of the Green tract. Jader admits that it became aware of Lovilia's incursion onto the Shawnee tract, but denies that it authorized Lovilia to cross the property line, in writing or otherwise.

After mining to the west along one of the seams of coal, Lovilia began to mine the portion of the other seam

lying under the surface of the Green tract. By February 1984 it had reached the northern and eastern limits of the Green tract, and resumed mining to the west along the second seam of coal. Its progress was marked on mine maps prepared monthly by a Lovilia engineer. The engineer prepared a copy of the monthly map for Jader, but the map was not delivered to Jader. Rather it was kept at Lovilia's office at the mine site, and was made available to Jader engineer Gary Carr at Carr's request. Williams testified at trial that the maps accurately described the extent of Lovilia's mine, and that Carr could have seen for himself that at some point in late 1984 or early 1985 the westernmost end of Lovilia's mine tunnel crossed the boundary between the Green and Shawnee tracts.

As Lovilia dug west, the price of coal headed south. Lovilia began to lose money, and in late March 1985 it stopped mining operations and laid off its miners. However, it continued to employ a skeleton crew to look after the mine and tend the electric pumps that kept the tunnels from flooding. Wignall testified at trial that the shutdown was temporary and that he and Williams anticipated reopening the mine when coal prices rebounded. The halt in mining, however, caused Lovilia to experience serious cash-flow problems. Lovilia's efforts to obtain a loan proved unsuccessful, and in the summer of 1985 it defaulted on payments owed to suppliers from whom it had leased mining equipment. Some of these suppliers repossessed their equipment, removing the belt feeders that carried coal from the mine to the surface as well as other equipment. However, the pumps and the electrical equipment that powered them stayed in place.

In the spring of 1985, Jader applied for a permit to strip mine on the Shawnee tract. While reviewing Jader's application, the state inspector asked Jader's representative about the possibility that the proposed strip mine would cut through underground mine tunnels. The final permit Jader obtained from the state specified that any tunnels cut by the strip mine would be sealed with compacted clay.

Jader began strip mining on the Shawnee tract in June 1985. At that time, Carr marked the western limits of Lovilia's mine with two large stakes topped with brightly-colored ribbons. At some point, however, Carr and Downen decided to extend the trench Jader was digging into the surface of the Shawnee tract beyond the stakes. On August 6, 1985, the Jader strip mine cut through Lovilia's mine at a point below the surface of the Shawnee tract. As it had indicated in the state permit, Jader sealed the Lovilia tunnel with fire clay, concealing the entries by August 29, 1985.

John Tucker, a member of the crew Lovilia employed to maintain its sub-surface mine, inspected the mine's western tunnel before and after it was cut by the Jader strip mine. After Jader cut through Lovilia's tunnel, Tucker observed that the flow of water into the Lovilia mine, which had always been a "wet" mine plagued by seepage, increased. The pumps in the Lovilia mine, though apparently old and in poor condition, could cope with the flow of water into the mine until early September 1985, when three days of heavy rains struck southern Illinois. The pumps were unable to handle the heightened flow, and water reached the power transformer that supplied the pumps with current. The transformer shorted, knocking out the pumps, and flooding large portions of Lovilia's mine.

In the wake of the flooding, Tommy Wignall, the Lovilia partner who played the more active role in the mine's operations, filed for bankruptcy. Billie Williams, Lovilia's other partner, filed suit against Jader in district court.[1] Williams' complaint comprised six counts. Count I alleged that Jader had breached the covenant of good faith and fair dealing implicit in the Agreement between Jader and

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[1] Williams initially filed suit in United States District Court for the Central District of Illinois. Early in the litigation, however, Jader successfully moved to transfer this case to the Southern District.

Lovilia when it cut through Lovilia's tunnel. Williams sought ten million dollars in damages for this breach of contract. Count II alleged that Jader failed to exercise due care and caution in cutting through Lovilia's mine, and sought ten million dollars for the damage caused by Jader's negligence. Count III alleged that Jader's actions in cutting through the Lovilia tunnel were willful, and sought ten million dollars in compensatory damages and an additional ten million in punitive damages. Count IV charged Jader with trespassing on Lovilia's coal, and sought twenty million dollars in compensatory damages. Count V alleged that Jader's trespass was malicious and wanton, and added a claim for ten million dollars in punitive damages to the twenty million claimed in Count IV. Count VI alleged that Jader's repeated appropriation of coal from seams that Lovilia had the right to exploit under the Agreement constituted a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. The RICO count was dismissed early in the litigation and is not before us on appeal. Since the RICO count dropped out, jurisdiction in the district court has been founded solely upon the diversity of citizenship between Williams, a Tennessee resident, and Jader, a Delaware corporation with its principal place of business in Illinois. *See* 28 U.S.C. § 1332(a)(1).

The trial was divided into a liability phase and a damages phase. At the close of evidence in the liability phase, the district court granted Jader's motion for directed verdicts on all remaining counts of Williams' complaint except for Count II, which alleged negligence. The jury found that Jader had been negligent in cutting through Lovilia's tunnel, but also found that Lovilia was thirty percent contributorily negligent. In the damages phase, the jury fixed the total damages suffered by Lovilia at $365,000 and awarded Williams seventy percent of this amount, $255,500. Williams appeals, challenging the district court's award of directed verdicts to Jader on the contract claim, the willfulness claim, and the trespass and

wanton trespass claims, as well as rulings denying Williams' motion to strike Jader's proposed affirmative defenses, allowing a jury instruction concerning Lovilia's duty to mitigate damages, and admitting testimony and exhibits offered by several defense witnesses.

II. DIRECTED VERDICT ON THE CONTRACT CLAIM

Count I of Williams' complaint alleged that in cutting through Lovilia's tunnel, Jader breached the covenant of good faith and fair dealing implied by law in the Contract Mining Agreement between Jader and Lovilia. The district court granted Jader's motion for a directed verdict on this count, and Williams appeals that decision. He argues that there was evidence to suggest that Jader and Lovilia agreed that Lovilia could mine coal on the Shawnee tract, and that Jader prevented Lovilia from doing so by causing its sub-surface mine to become flooded and therefore unusable. This evidence, Williams suggests, created disputed issues of material fact that should have been resolved by the jury.

Jader's response is two-fold: first, it argues that Illinois law does not provide an independent cause of action for a breach of the implied covenant of good faith and fair dealing. Second, Jader contends that there was no evidence that it had breached any covenant of good faith and fair dealing fairly impliable from the Agreement. Jader points out that it reserved the right to strip mine on the Green and Shawnee tracts, and that Lovilia had no absolute right under the agreement to mine on the Shawnee tract. If Lovilia had not itself breached the Agreement by extending its tunnel below the surface of the Shawnee tract, Jader argues, it would not have come in contact with Jader's strip mining operations. Jader also argues that the evidence Williams introduced at trial concerning the oral permission Jader officials allegedly gave Lovilia to extend its tunnel onto the Shawnee tract was an attempt to evade the contract's merger and no-oral-modification clauses.

" 'When reviewing directed verdicts in diversity cases, we use the state's standard of review.' " *H.B. Fuller Co. v. Kinetic Systems Inc.*, 932 F.2d 681, 686 (7th Cir. 1991) (quoting *Consolidated Bearings v. Ehret-Krohn Corp.*, 913 F.2d 1224, 1227 (7th Cir. 1990)). In Illinois, "[a] verdict should not be directed unless 'all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Darnell v. Impact Indus.*, 105 Ill. 2d 158, 162, 473 N.E.2d 935, 937 (1984) (quoting *Pedrick v. Peoria & E. R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513 (1967)). *See also McMahon v. Eli Lilly & Co.*, 774 F.2d 830, 832 (7th Cir. 1985); *Hare v. Foster G. McGaw Hosp.*, 192 Ill. App. 3d 1031, 1034, 549 N.E.2d 778, 781 (1st Dist. 1989), *appeal denied*, 131 Ill. 2d 559, 553 N.E.2d 396 (1990). Applying this standard, we agree with Williams that there are disputed factual questions material to his claim for breach of contract that preclude the award of a directed verdict.

Under Illinois law, "[e]very contract implies good faith and fair dealing between the parties to it." *Martindell v. Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 286, 154 N.E.2d 683, 690 (1958). *See also Unit Trainship v. Soo Line R. Co.*, 905 F.2d 160, 163 (7th Cir. 1990); *AMPAT/Midwest v. Illinois Tool Works*, 896 F.2d 1035, 1041 (7th Cir. 1990); *First Nat'l Bank of Cicero v. Sylvester*, 196 Ill. App. 3d 902, 910, 554 N.E.2d 1063, 1069 (1st Dist.), *appeal denied*, 133 Ill. 2d 555, 561 N.E.2d 690 (1990). As Jader points out, under Illinois law the covenant of good faith and fair dealing is not an independent source of duties assumed by parties to a contract and a breach of the covenant does not by itself create a cause of action. *See Powers v. Delnor Hosp.*, 135 Ill. App. 3d 317, 321-22, 481 N.E.2d 968, 972 (2d Dist. 1985). Rather, the covenant "is in aid and furtherance of other terms of the agreement of the parties," *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286, 1290 (N.D. Ill. 1983) (internal quotations omitted), and no obligation can be implied which

would be inconsistent with the explicit terms of the contract. *Id.* at 1289-90 (citing *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 305, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983)). The "nature of [the] limitation" imposed by the covenant is that "a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 991, 466 N.E.2d 958, 972 (1st Dist. 1984). *See also First Nat'l Bank of Cicero*, 196 Ill. App. 3d at 910-11, 554 N.E.2d at 1069; *Carrico v. Delp*, 141 Ill. App. 3d 684, 690, 490 N.E.2d 972, 976 (4th Dist. 1986); *Foster Enters. v. Germania Fed. Sav. & Loan Ass'n*, 97 Ill. App. 3d 22, 30, 421 N.E.2d 1375, 1381 (3d Dist. 1981).

Jader argues that Williams' claim is barred by the principle that courts may not create implied duties of good faith and fair dealing which are inconsistent with the explicit terms of the agreement. The explicit terms Jader points to are the provisions of the agreement barring Lovilia from mining on the Shawnee tract without Jader's prior approval, and the provisions requiring that all notices be in writing, prohibiting oral modifications to the contract, and providing that the written terms of the Agreement represented the entire agreement between the parties.

Jader's reliance on these provisions is misplaced. Merger clauses stating that the terms of a contract represent the entire agreement are probative of the intent of the parties that the agreement be viewed as complete; Illinois courts called upon to interpret unambiguous agreements containing merger clauses will, as a general rule, refuse to allow "parol evidence of a prior or contemporaneous agreement or terms not included in the instrument." *Commonwealth Eastern Mortgage Co. v. Vaughn*, 179 Ill. App. 3d 129, 135, 534 N.E.2d 453, 457 (1st Dist. 1989). In this case, however, Williams seeks to show that at some point after the parties signed the Agreement, Jader orally permitted

Lovilia to mine on the Shawnee tract. While this contention is indeed inconsistent with the terms of the Agreement, the evidence Williams presents to support it consists not of "prior or contemporaneous" agreements which did not find their way into the Agreement and are thus presumptively excluded by the merger clause and the parol evidence rule. Rather, Williams relies on evidence that *after* the conclusion of the Agreement, Jader and Lovilia modified it by permitting Lovilia to extend its mine west of the border between the Green and Shawnee tracts. Neither the parties' inclusion of a merger clause nor the parol evidence rule bars the introduction of evidence of modifications occurring after the formation of a contract. *See, e.g.*, 2 E. Farnsworth, Contracts, § 7.5 at 228 (1990) ("parol evidence rule applies only to precontractual negotiations" and "does not bar evidence of subsequent negotiations to show modification of the contract.").

Jader's reliance on the contract's clause barring oral modifications is equally unavailing. It is settled law in Illinois that, except for agreements concerning the sale of goods, *see* Ill. Ann. Stat. ch. 26, ¶ 2-209(2) (Smith-Hurd 1963), "parties may modify contracts orally after including a contract provision that precludes oral modification." *Ehret-Krohn Corp.*, 913 F.2d at 1231. *See also Monarch Coaches v. ITT Indus. Credit*, 818 F.2d 11, 12 (7th Cir. 1987); *Park v. Dealers Transit, Inc.*, 596 F.2d 203, 204-05 (7th Cir. 1979); *Falcon, Ltd. v. Corr's Natural Beverages*, 165 Ill. App. 3d 815, 821-22, 520 N.E.2d 831, 835 (1st Dist. 1987); *South Shore Amusements v. Supersport Auto Racing Ass'n*, 136 Ill. App. 3d 284, 287, 483 N.E.2d 337, 340 (1st Dist. 1985); *Estate of Kern v. Handelsman*, 115 Ill. App. 3d 789, 794, 450 N.E.2d 1286, 1290 (1st Dist. 1983). If, as Williams contends, Jader and Lovilia agreed that Lovilia could mine below the surface of the Shawnee tract, the parties modified the Agreement's provision requiring all notices to be in writing, allowing Lovilia to mine without written notice from Jader permitting it to do so.

The parties disagree as to whether Jader verbally permitted Lovilia to extend its mine tunnel onto the Shawnee

tract.[2] Jader argues that this factual dispute is immaterial to Williams' claim. It contends that whether or not it allowed Lovilia to mine the Shawnee tract, it retained the right under the Agreement to mine the Shawnee tract by surface methods, which was what it was doing when it broke through Lovilia's tunnel. We take a different view. Resolving this factual dispute in Lovilia's favor, we assume it had Jader's permission to mine the Shawnee tract. If so, by cutting through Lovilia's tunnel Jader exercised its discretion, provided for in the Agreement, to strip-mine the Shawnee tract in such a way as to prevent Lovilia from continuing *its* mining operations. This prevented Lovilia from performing its obligations under the Agreement, which included mining the Green tract on a continuous basis until all the coal was removed from that tract. *See* Restatement (Second) of Contracts § 205 comment d (1981) (bad faith includes "interference with or failure to cooperate in the other party's performance"). Whether or not Jader acted in bad faith depends on whether or not Lovilia mined the Shawnee tract with Jader's permission.[3] Because this question is one for the jury, the district court's award of a directed verdict to Jader on Williams' contract claim was error.

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[2] Tommy Wignall testified at trial that Jader gave its authorization at a meeting held in the Summer of 1982. Trial Transcript ("Tr.") at 61. Neither Ed Downen nor Gary Carr could recall this meeting, and both testified that they first learned that Lovilia's tunnel had crossed the Green tract's western boundary in 1983. Tr. 254-55, 295.

[3] We do not reach the question of whether Jader's actions are excused by Lovilia's cessation of mining operations in late March 1985, slightly more than four months before Jader broke through Lovilia's mine tunnel. We also leave open the question of whether Jader is estopped from asserting that Lovilia had no right to mine the Shawnee tract because it had notice that Lovilia was doing so and failed to object.

III. DIRECTED VERDICT ON WILLFULNESS COUNT

Count III of Williams' complaint sought an award of punitive damages on the ground that Jader acted willfully when it cut through Lovilia's tunnel. At the close of Williams' case, Jader moved for a directed verdict on the issue of willfulness, and the district court granted Jader's motion. In its decision denying Williams' motion for a new trial, the district court explained this ruling, writing that "[t]he record before this court and the evidence produced at trial could clearly establish that the defendant reserved the right to mine coal, and it did so. There was absolutely no evidence presented to demonstrate that the defendant intentionally cut into the plaintiff's mine works . . . ." Order, May 15, 1990, at 3. On appeal, Williams argues that there was in fact evidence to show both that Jader intentionally cut through Lovilia's mine tunnel and that when it did so, it was aware that it might damage equipment that Lovilia had left in the tunnel. Jader responds that, though it knew the location of Lovilia's underground mine tunnel, it did not intend to cut through the tunnel or to damage mining equipment. Jader points out that after cutting through Lovilia's mine it took steps to protect the exposed portion of the Lovilia tunnel. Jader also argues that it was mining on land for which it retained mining rights, whereas Lovilia had no right to tunnel below the surface of the Shawnee tract.

"Illinois courts take rather a dim view of punitive damages, and insist that the plaintiff seeking them demonstrate [ ] extraordinary or exceptional circumstances clearly showing malice or willfulness." *AMPAT/Midwest*, 896 F.2d at 1043 (citations and internal quotations omitted). *See also Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 414, 563 N.E.2d 397, 402 (1990) (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186, 384 N.E.2d 353, 360 (1978)). "[T]he initial decision whether punitive damages may be imposed in a particular case in [Illinois] is a matter normally reserved for the trial judge." *Loitz*, 138 Ill. 2d at 414, 563 N.E.2d at

401. *See also J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating*, 118 Ill. 2d 447, 453, 516 N.E.2d 260, 263 (1987). In making this decision, the trial court views all the evidence in the light most favorable to the party seeking punitive damages. *See, e.g., Queen v. Behm*, 58 Ill. App. 3d 253, 255, 373 N.E.2d 1382, 1383 (2d Dist. 1978).

Decisions to direct verdicts in Illinois are generally reviewed de novo, with the appellate court applying the same standard as does the trial court. *See Thomas v. Nelson Bros. Furniture*, 167 Ill. App. 3d 49, 53, 520 N.E.2d 1078, 1080-81 (1st Dist. 1988). Notwithstanding this general rule, some Illinois intermediate appellate decisions have applied a more lenient standard when reviewing trial court decisions to direct verdicts on punitive damages counts, examining the trial court's ruling only to determine whether or not the trial judge abused her discretion in directing a verdict for the defendant on the count seeking punitive damages or, alternatively, allowing the jury to consider the question. *See, e.g., PCx Corp. v. Ross*, 209 Ill. App. 3d 530, 539-40, 568 N.E.2d 311, 317 (1st Dist. 1991) ("A request for punitive damages is addressed to the sound discretion of the trial court and a decision to deny such damages will not be reversed absent an abuse of that discretion."); *Motsch v. Pine Roofing Co.*, 178 Ill. App. 3d 169, 177, 533 N.E.2d 1, 6 (1st Dist. 1988) ("[W]here a plaintiff's factual allegations are sufficient to state a claim for punitive damages, the trial court has discretion to submit the issue to the jury, and the court's determination will not be disturbed absent an abuse of that discretion."); *Warren v. LeMay*, 142 Ill. App. 3d 550, 580, 491 N.E.2d 464, 483 (5th Dist. 1986); *Gaunt & Haynes, Inc. v. Moritz Corp.*, 138 Ill. App. 3d 356, 363, 485 N.E.2d 1123, 1129 (5th Dist. 1985); *Behm*, 58 Ill. App. 3d at 255, 373 N.E.2d at 1383. In *Loitz*, however, the Illinois Supreme Court hinted that appellate courts should apply the same standard in reviewing directed verdicts concerning punitive damages as do trial courts. Though reversing decisions by the trial and appellate courts allowing the

jury to consider the question of punitive damages, the Illinois Supreme Court noted that *it*—not the trial court—reached this conclusion despite "[v]iewing the record in the light most favorable to the plaintiff." 138 Ill. 2d at 426, 563 N.E.2d at 407. It supported this proposition with a citation to *Pedrick v. Peoria & E. R.R. Co.*, 37 Ill. 2d 494, 229 N.E.2d 504 (1967), perhaps the leading Illinois case concerning the standard to be applied in deciding motions for directed verdicts. *Loitz* at 426, 563 N.E.2d at 407. We read *Loitz* to suggest that decisions on directed verdicts concerning punitive damages counts are not exceptions to the usual Illinois rule that trial court decisions granting or denying directed verdicts are reviewed de novo.[4]

Applying this standard of review, we conclude that the district court erred in preempting the jury's determination as to whether Jader acted willfully in cutting through Lovilia's mine tunnel. As we observed in our discussion of the contract claim at issue in this case, reasonable jurors could conclude based on the evidence presented that Lovilia had received Jader's permission to extend its mine across the western boundary of the Green tract. Jurors could likewise conclude that Jader knew with some measure of certainty how far west of the boundary the Lovilia tunnel extended by the time it began to dig its strip mine. Gary Carr, Jader's engineer, testified that in

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[4] In *In re Estate of Wernick*, 127 Ill. 2d 61, 535 N.E.2d 876 (1989), the Illinois Supreme Court reviewed the decision of an intermediate appellate court, which had reversed a trial court's decision, rendered in a bench trial at the close of all the evidence, to refuse plaintiff's request for an award of punitive damages. Identifying the standard of review that it and the appellate court employed, the Supreme Court wrote that it would not disturb the finding of a trial court "unless it is against the manifest weight of the evidence." Here too, the Supreme Court did not distinguish between the standard of review applied to trial court decisions concerning punitive damages and the standard of review it applied to these decisions generally. *See id.* at 85-86, 535 N.E.2d at 887 (citing *Schulenburg v. Signatrol*, 37 Ill. 2d 352, 356, 226 N.E.2d 624, 626 (1967)).

May of 1985 he and Ed Downen discussed the need to stake off the western limits of the Lovilia tunnel, and that Carr dug long wooden stakes topped with blue and pink ribbons into the surface of the Shawnee tract to indicate the western end of Lovilia's mine tunnel. Tr. 25-28. Nevertheless, Ed Downen, Jader's mining superintendent, testified that he decided that if Jader's strip mine hit Lovilia's sub-surface mine, he would order Jader's miners to cut through Lovilia's tunnel. Tr. 43. Downen also testified that when Jader made its first cut on the Shawnee tract, its employees saw evidence of underground mining activity in the waste that they removed. Nevertheless, Downen ordered two more passes, the second of which cut all the way through Lovilia's tunnel. Tr. 43-44. The parties dispute whether Jader knew or should have known that Lovilia had kept some of its mining equipment in the mine and that, though Lovilia had ceased active mining operations, it continued to send personnel to inspect the mine periodically. Lovilia offered expert testimony that cutting through the mine tunnel would inevitably interfere with the ventilation and flow of water through the sub-surface mine. Tr. 215-18, 234-37. Based on this evidence, we think that reasonable jurors could conclude that in intentionally cutting through Lovilia's mine tunnel, Jader acted "willfully or with such gross negligence as to indicate a wanton disregard of the rights of others." *Parsons v. Winter*, 142 Ill. App. 3d 354, 360, 491 N.E.2d 1236, 1241 (1st Dist. 1986). They could, however, decide that Jader lacked the requisite willfulness because it subjectively believed that it had the right to strip mine on the Shawnee tract and acted in good faith in doing so. *Cf. Behm*, 58 Ill. App. 3d at 255, 373 N.E.2d at 1383 (directed verdict in favor of defendants on punitive damages count affirmed where defendants committed trespass "under a clear color of title."). All we need decide today is that, resolving all factual disputes in Williams' favor, the evidence in the district court was sufficient to create triable issues of fact as to whether punitive damages might be appropriate. Because the district court's ruling on Jader's motion for a

directed verdict prevented the jury from reaching this question, we reverse and remand.

IV. DIRECTED VERDICTS ON TRESPASS AND WANTON TRESPASS COUNTS

Count IV of Williams' complaint alleged that Jader trespassed upon Lovilia's rights to the coal located on the Green and Shawnee tracts when it cut through Lovilia's mine tunnel. Williams claimed damages in the amount of twenty million dollars, which he asserts equals the profit Lovilia would have realized from the continued operations of its mine. Count V realleges the facts set forth in Count IV, and alleges additionally that Jader's actions were malicious and wanton. In addition to the twenty million dollars claimed in Count IV, Count V seeks an additional ten million dollars in punitive damages for the trespass. The district court granted Jader's motion for a directed verdict on Counts IV and V. In a post-trial decision, it explained this ruling by noting that Jader had retained the right to mine coal on both the Green and Shawnee tracts and thus could not be liable for trespassing upon Lovilia's coal.

On appeal, Williams argues that Lovilia's contractual right to mine coal located in two seams under the Green and the Shawnee tracts is sufficient to allow it to maintain an action for trespass. Jader responds that under the Agreement it retained the right to mine by other than sub-surface methods on both the Green and Shawnee tracts, and that its rights to the coal preclude its liability in an action for trespass.

We agree with Jader and the district court that Williams has failed to present facts that would establish a claim for trespass or wanton trespass. Williams is right to observe that in Illinois, "the gist of" a trespass action "is an injury to possession." *Lawless v. Pierce*, 118 Ill. App. 3d 747, 753, 455 N.E.2d 113, 115 (1st Dist.), *cert. denied*, 467 U.S. 1241 (1983). *See also Krejci v. Capriotti*, 16 Ill. App. 3d 245, 247, 305 N.E.2d 667, 669 (1st Dist. 1973).

He argues that the Agreement gave Lovilia the exclusive right to mine coal on the Green tract—and possibly the Shawnee tract as well—by sub-surface methods. However, the exclusive right to mine coal by sub-surface methods is not the same thing as the exclusive right to mine coal. With respect to coal that could be reached by both sub-surface and strip-mining methods (which seems to include all the coal in the two seams Lovilia was permitted to mine) Jader and Lovilia had equal rights.

Notwithstanding the non-exclusivity of Lovilia's interest, it relies upon a series of venerable decisions allowing actions by one mining company against another when the plaintiff concern has an *exclusive* right to mine coal on a given tract of land. The non-exclusivity of Lovilia's right to the coal, however, is sufficient to distinguish the cases upon which Williams relies upon from the facts of this dispute. For example, in *Hartford Iron Mining Co. v. Cambria Mining Co.*, 93 Mich. 90, 53 N.W. 4 (1892), the plaintiff and defendant were licensees, each of which enjoyed the exclusive right to mine on one of two adjoining parcels of land. Plaintiff Hartford brought suit to recover in trover from defendant Cambria, which Hartford alleged was mining under the surface of its land. The Michigan Supreme Court noted that a prerequisite to Hartford's action was the nature of its interest in the land: an exclusive license to mine. *Id.* at 93, 53 N.W. at 5. In distinguishing cases upon which Cambria relied, the Court quoted from the New Jersey Chancery Court's opinion in *East Jersey Iron Co. v. Wright*, 32 N.J. Eq. 248 (Ch. 1880). In *East Jersey Iron*, the Court wrote that a non-exclusive license allows the licensor, to " '[it]self take ore from the same land or mine, or license others to do so.' " *Hartford Iron Mining*, 93 Mich. at 94, 53 N.W. at 5 (quoting *East Jersey Iron*, 32 N.J. Eq. at 255). In this case, Jader and Lovilia agreed that the latter would have a non-exclusive license, permitting Jader to "itself take ore from the same land or mine." It is not liable in trespass for doing so.

The agreement between Jader and Lovilia created rights to the coal that might usefully be viewed as a tenancy

in common, in which each of the two parties held an undivided interest to all the coal identified in the Agreement. *See In re Victor*, 218 F. Supp. 218, 220 (S.D. Ill. 1963); *Douds v. Fresen*, 392 Ill. 477, 480, 64 N.E.2d 729, 731 (1946). This does not mean that either could conduct its mining operations in such a way as to preclude the other from doing the same. For example, in *Douglas Theater v. Gold Standard Enters.*, 188 Ill. App. 3d 573, 544 N.E.2d 1053 (1st Dist. 1989), the plaintiff movie house and the defendant liquor store both had the right to use a parking lot, under instruments that specified "that each lessee's use shall be in common with the other on a 'first-come-first-served basis.' " *Id.* at 575, 544 N.E.2d at 1055. The appellate court held, however, that the right to use the lot on a first-come-first-served basis "cannot mean that the lot may be used in such a way as to interfere with the use by another lessee for the normal operation of its business." *Id.* at 579, 544 N.E.2d at 1058. Rather, the Court suggested that the parties to the common tenancy were required to deal fairly with each other.

If indeed Illinois law views the mutual duties of tenants in common—like those of parties to a contract—to include a duty to deal with each other fairly and in good faith, it is unclear what distinguishes Williams' trespass claim from his contract claim. More fundamentally, Illinois does not permit tenants in common to sue each other for trespass. *Conklin v. Newman*, 278 Ill. 30, 36, 115 N.E. 849, 851 (1917); *Dishinger v. Bon Air Catering*, 336 Ill. App. 557, 567, 84 N.E.2d 562, 567 (2d Dist. 1949). We agree with the district court that, given the non-exclusive nature of Lovilia's interest in the coal, it could not, as a matter of law, sustain a trespass action against Jader. Of course, if Williams cannot maintain a trespass action, neither can he maintain an action for wanton and malicious trespass.

V. JADER'S AFFIRMATIVE DEFENSES

The next issue on appeal concerns four affirmative defenses put forward by Jader to be used in the liability

phase of this divided trial. All these defenses related to Count II of Williams' complaint, which alleged that Jader was negligent in cutting through Lovilia's mine tunnel. At the instructions conference late in the liability phase of the trial, Williams moved unsuccessfully to strike each of these defenses.

Federal Rule of Civil Procedure 12(f) permits a district court to strike portions of a pleading "[u]pon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party." The Federal Rules do not permit a response to an answer that does not contain a counterclaim. *See* Fed. R. Civ. Pro. 7(a); 5 C. Wright & A. Miller, Federal Practice & Procedure (Civil) § 1183 at 14 (2d ed. 1990). Williams' motion, then, falls within the second clause of Rule 12(f)'s timing requirements, the clause applicable to motions to strike pleadings to which "no responsive pleading is permitted" under the Rules. Under this clause, he was required to make his motion to strike Jader's affirmative defenses within 20 days after he was served with Jader's answer. Jader's first answer, which is not included in the record on appeal, was filed with the district court on June 12, 1987. Its amended answer, which is in the record and does contain the four affirmative defenses at issue, was filed on October 7, 1988. Jader's motion to strike these affirmative defenses, however, was not made until November 30, 1989.

However, neither Jader nor the district court contested the timeliness of the motion, and the district court proceeded to consider it at the instructions conference. Tr. 416-423. Rule 12(f) provides that a district court "may order stricken from any pleading any insufficient defense," "upon the court's own initiative at any time." Courts have read Rule 12(f) to allow a district court to consider a motion to strike at any point in a case, reasoning that it is considering the issue of its own accord despite the fact that its attention was prompted by an untimely filed

motion. *See, e.g., FDIC v. British-American Corp.*, 744 F. Supp. 116, 117 (E.D.N.C. 1990); *National Union Fire Ins. v. Alexander*, 728 F. Supp. 192, 194 (S.D.N.Y. 1989); *Krauss v. Keibler-Thompson Corp.*, 72 F.R.D. 615, 617 (D. Del. 1976); *Uniroyal, Inc. v. Heller*, 65 F.R.D. 83, 86 (S.D.N.Y. 1974); *Stonybrook Tenants Ass'n v. Alpert*, 29 F.R.D. 165, 168 (D. Conn. 1961). The district court elected to reach the merits of Williams' motion to strike despite its untimely filing. We, too, address the merits.

The four affirmative defenses tendered by Jader all concerned Lovilia's alleged contributory negligence. The first defense was that Lovilia failed to keep Jader apprised of the location of its underground mine works. The second was that Jader mined coal from the Shawnee tract, which it was not permitted to do under the Agreement, thereby exposing its works to flooding. The third was that Lovilia failed to properly pump water from its mine tunnels. The fourth was that Lovilia failed to remove its underground mining equipment from the mine after halting mining operations in late March 1985. Williams contends that the district court's failure to strike each of the defenses was error. As to the first defense, he argues that whether or not Lovilia kept Jader informed of where it was mining, the evidence at trial established that Jader knew the location of Lovilia's tunnel. As to the second, Williams contends that whether or not Jader was in an unauthorized zone is irrelevant to the question of whether Lovilia's negligence contributed to Jader's actions in cutting through Lovilia's tunnel. As to both the third and fourth, Williams concedes that the defenses might be relevant to the question of whether Lovilia mitigated its damages after Jader cut through its mine tunnel, but he argues that neither is relevant to the question of contributory negligence. Williams suggests that allowing the jury to consider these two defenses in relation to contributory negligence in the liability phase of the trial and then to consider them again with regard to mitigation in the damages phase resulted in "double-counting" and a diminished award of damages.

Affirmative defenses will be stricken "only when they are insufficient on the face of the pleadings." *Heller Financial v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). Motions to strike "are 'not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense,' " *Glenside West Corp. v. Exxon Co.*, 761 F. Supp. 1100, 1115 (D.N.J. 1991) (quoting *Durham Indus. v. North River Ins. Co.*, 482 F. Supp. 910, 913 (S.D.N.Y. 1979)), and are inferable from the pleadings, *see United States v. 416.18 Acres of Land*, 514 F.2d 627, 631 (7th Cir. 1975). In a diversity case, the legal and factual sufficiency of an affirmative defense is examined with reference to state law. *See Farmers & Merchants State Bank v. Norfolk & Western Ry.*, 673 F. Supp. 946, 947 (N.D. Ind. 1987).

"Contributory negligence is lack of due care for one's safety as measured by the objective reasonable-man standard. In other words, the plaintiff is required to exercise that care which the reasonably prudent person would take to avoid injury in like circumstances." *Long v. City of New Boston*, 91 Ill. 2d 456, 463-64, 440 N.E.2d 625, 628 (1982) (citation omitted). However, "[i]t is not every negligence of a plaintiff that will be considered . . . for the purpose of allocation of damages." *Owens v. Stokoe*, 115 Ill. 2d 177, 183, 503 N.E.2d 251, 254 (1986). Rather, " '[t]he plaintiff's negligence will not [reduce] recovery unless it is a proximate cause of his injury.' " *Id.*, 503 N.E.2d at 254 (quoting 4 F. Harper, F. James & O. Gray, The Law of Torts, § 22.10 at 342 (2d ed. 1986)).

Applying this substantive law and the lenient procedural standard used to decide a motion to strike an affirmative defense, we can dispose easily of the first defense Williams argues should not have reached the jury. In this defense, Jader asserted that Lovilia was contributorily negligent in failing to inform Jader of the location of Lovilia's tunnel. This contention is not inconsistent with reasonable inferences that could be drawn from the pleadings, most importantly that Jader did not know that Lovilia

had begun to mine west of the border between the Green and Shawnee tracts. And, if the factual underpinnings of this defense were to be proven, it might well represent a failure on Lovilia's part to exercise due care that contributed to Jader's strip mine cutting through Lovilia's sub-surface mine. The district court correctly refused Williams' motion to strike this defense.

The same is true for the second affirmative defense. The question of whether Lovilia had the right to mine the Shawnee tract, as our earlier discussions of the contract and willfulness claims suggest, is both a central issue in the case and one upon which the parties differ. It is not inconsistent with the pleadings for Jader to argue that Lovilia had no right to extend its tunnel onto the Shawnee tract, and that in doing so, it increased the risk that Jader, which contemplated strip mining on the Shawnee tract at the time of the Contract Mining Agreement and thereafter, would strip-mine through Lovilia's mine works. If Lovilia never received permission to mine under the Shawnee tract, doing so was not only a breach of the Agreement but may have been contributorily negligent as well, particularly given its knowledge that Jader planned at some point to conduct surface mining on the land.

The third and fourth affirmative defenses present more difficult questions. Neither is inconsistent with the pleadings, and neither presents facts inconsistent with fair inferences that could be drawn from the pleadings. However, it is unclear how either could have caused, either alone or in combination with other proximate causes, Jader to strip-mine through Lovilia's sub-surface mine. Rather, both seem to relate more to Lovilia's alleged failure to mitigate the injury it suffered when Jader mined through its tunnel, or, in other words, to prevent the avoidable consequences of Jader's action from occurring.

The doctrines of contributory negligence and mitigation of damages (also known as avoidable consequences) are "[s]omewhat similar." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts, § 65 at 458 (5th ed. 1984).

> The statement commonly made as to the distinction between the two is that contributory negligence is negligence of the plaintiff before any damage, or any invasion of his rights, has occurred, which bars all recovery. The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages.

Id. See also Restatement (Second) of Torts § 918 comment a (1977); *Nilson-Newey & Co. v. Ballou*, 839 F.2d 1171, 1175 (6th Cir. 1988) (unlike contributory negligence, duty to mitigate damages "arises only after the defendant's tortious conduct, not before it"); *Kirby v. Larson*, 400 Mich. 585, 617, 256 N.W.2d 400, 416 (1977) (plurality opinion) ("Negligence subsequent to the injury is distinguished from contributory negligence, which is negligence that contributed proximately to cause the injury."). We believe that both Jader's third and fourth affirmative defenses concern Lovilia's alleged failure to protect its mine and its mining equipment from being flooded *after* August 5, 1985, when Jader cut through Lovilia's tunnel and allegedly increased the flow of water into Lovilia's underground works.

In a diversity case applying the law of a state which adheres to a pure comparative negligence system for apportioning damages in tort cases, the distinction between reducing a plaintiff's damages because of its comparative negligence and doing the same because it failed to take reasonable steps to avert the consequences of the defendant's tortious conduct might be of little moment. A jury in a pure comparative negligence jurisdiction could reduce the portion of total damages attributable to the defendant for one reason or the other, and reach the same result. Illinois was for most of the 1980s a pure comparative negligence jurisdiction, *see Alvis v. Ribar*, 85 Ill. 2d 1, 27-28, 421 N.E.2d 886, 896-97 (1981), but in 1987 adopted a modified form of comparative negligence which provides that tort plaintiffs cannot recover damages "if the trier of fact finds that the contributory fault on the part of the

plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought." Ill. Ann. Stat. ch. 110, ¶ 2-1116 (Smith-Hurd Supp. 1991). Under Illinois' modified comparative negligence statute, the distinction between acts which establish contributory negligence and acts which establish a failure to mitigate damages regains some of the importance it had in the era of pure contributory negligence. *See* Prosser & Keeton, *supra*, § 65 at 458 & n.71 (collecting cases). Under the statute, for example, a plaintiff who suffers $100,000 in damages because of an automobile accident for which he was forty-five percent at fault would recover $55,000. If the jury were also to conclude that the plaintiff's failure promptly to seek medical attention following the accident—perhaps the prototypical example of a failure to mitigate damages—was the cause of $15,000 of his injuries, it would reduce the award to $40,000. If, however, the jury was instructed that the failure to seek medical help was contributory negligence, it might find that the plaintiff was sixty percent culpable, leading it to deny the plaintiff *any* recovery.

The divided trial in this case added another wrinkle. Because a jury finding that Lovilia was more than fifty percent contributorily negligent would bar Williams from recovery, the issue of comparative negligence was appropriately resolved in the liability phase. *Cf. Nilson-Newey*, 839 F.2d at 1175 (failure to raise issue of contributory negligence in liability phase of bifurcated trial in diversity action applying law of contributory negligence state waives issue). The question of whether Williams' recovery should be reduced because of Lovilia's failure to prevent the occurrence of avoidable consequences such as the flooding of the mine, however, related to the amount of its recovery and was properly addressed in the damages phase. The district court, however, characterized all of Jader's affirmative defenses as relating to contributory negligence and allowed the jury to consider all of them in the liability phase. Then, as is discussed more fully below, it instructed the jury in the damages phase that Lovilia had a duty to

mitigate. We agree with Williams that the district court's failure to strike the third and fourth affirmative defenses invited the jury to reduce plaintiff's damages twice, once in the liability phase in the guise of contributory negligence and a second time in the damages phase in assessing whether Lovilia complied with its duty to mitigate. Because this may have led the jury to allocate too high a percentage of the damages it determined Williams suffered to Lovilia's negligence before and after Jader cut through its mine, we vacate and remand for a new trial on Count II of Williams' complaint. On remand, the district court remains free to instruct the jury on Jader's first two affirmative defenses in the liability phase. The second two affirmative defenses, however, relate to the question of mitigation and should be considered only in the damages phase.

VI. JURY INSTRUCTION ON DUTY TO MITIGATE

Williams' next argument on appeal is closely related to his previous argument concerning the affirmative defenses. In the damages phase, the district court instructed the jury that Lovilia had a duty to use ordinary care to minimize the damages caused it by Jader's allegedly tortious conduct. On appeal, Williams contends that the district court erred in giving this instruction because it had previously allowed the jury to consider Jader's third and fourth affirmative defenses, which Williams characterizes as relating to Lovilia's duty to mitigate rather than to its contributory negligence. As we have previously discussed, we agree with that characterization. It was error for the district court to both instruct the jury on the last two of Jader's affirmative defenses in the liability phase and to instruct it on Lovilia's duty to mitigate in the damages phase.

Beyond the "double-counting" problem, however, we can find no error in the district court's jury instruction. "A party has a right to have the jury instructed on its theory of recovery or defense if that theory is supported by facts

in evidence or by reasonable inferences from facts in evidence." *Wallace v. Weinrich*, 87 Ill. App. 3d 868, 877, 409 N.E.2d 336, 343 (5th Dist. 1980). *See also Shaheed v. Chicago Transit Auth.*, 137 Ill. App. 3d 352, 360, 484 N.E.2d 542, 549 (1st Dist. 1985); *Harris v. Day*, 115 Ill. App. 3d 762, 772, 451 N.E.2d 262, 267 (4th Dist. 1983). The evidence at trial showed that Lovilia's employee, John Tucker, observed increased water accumulation in visits to the mine he made in the days and weeks after Jader cut through Lovilia's tunnel and observed that the water had reached some of Lovilia's mining equipment. Tr. 125-131. Reasonable jurors could have concluded that Lovilia's failure to remove equipment from the mine or otherwise to protect itself from the increased danger of flooding in the weeks between early August 1985, when Jader cut through Lovilia's tunnel, and early September 1985, when heavy rains increased the flow of water into the mine beyond the capacity of Lovilia's pumps, represented a failure to prevent the avoidable consequences of Jader's tortious conduct from coming to pass.

VII. TESTIMONY OF ROY GREER

In the damages phase of the trial, Jader called Roy Greer, a state mining official whose responsibilities included inspecting the Lovilia mine. Greer testified that he last walked through the mine in March 1985 and observed various pieces of mining equipment, including golf carts and other wheeled vehicles used to travel through the mine, a battery charger, and an arc welder. Tr. 560-564. In response to defense questioning, he said that all this equipment was sufficiently portable that it it could be removed from the mine without exceptional efforts. Williams objected to Greer's testimony, but this objection was overruled. On appeal, he argues that Greer had no personal knowledge as to what equipment was in the mine at any time after his March 1985 visit, making his testimony irrelevant to the question of whether Lovilia had removed equipment from the mine before August 5, 1985, when Jader cut through its tunnel, or had attempted

to mitigate its damages by removing this equipment after that date, once it became apparent that the flow of water into the mine had increased.

We review district court decisions concerning the admission or exclusion of evidence on grounds of relevance only for abuse of discretion. *Taylor v. National R.R. Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir. 1990). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In this case, the "fact that is of consequence" is whether Lovilia failed to mitigate its damages by keeping mining equipment in its mine unnecessarily. Greer's testimony is relevant because it establishes what equipment was in Lovilia's mine in March 1985, shortly before it stopped mining and four months before Jader cut through Lovilia's tunnel, and establishes that this equipment was easy to remove. This makes Lovilia's failure to remove the equipment when water accumulated in its tunnel seem less reasonable and more like the negligent failure to prevent the avoidable consequences of Jader's actions. Of course, Greer's testimony is not as probative on the question of Lovilia's mitigation efforts as the testimony of someone who visited the mine in the days after Jader cut through Lovilia's tunnel. But this shortcoming goes to the weight the jury should have given Greer's observations, not to the relevance of his testimony. Williams brought this shortcoming in Greer's testimony to the jury's attention on cross-examination, eliciting from the mining inspector the concession that Greer did not know what equipment was in the mine in September, when the mine began to fill with water. Tr. 565. The defense's line of questioning, though of limited probative value, was relevant, and the district court did not abuse its discretion in allowing it.

VIII. TESTIMONY OF ROGER MYERS/ USE OF EXHIBITS

Williams' next evidentiary challenge also concerns testimony presented in the damages phase of the trial. One of Jader's witnesses in the damages phase was its general manager, Roger Myers. Myers was asked a series of questions concerning the trend in the price per ton of coal Jader received when it sold coal during the period from 1983 to 1986. For the most part, that trend was downward. Williams interposed a variety of objections to this line of questioning at trial, and the ground he urges for its exclusion on appeal is not entirely clear from the abbreviated discussion of the issue in his brief. We believe he is objecting to the relevance of Myers' testimony about the prices Lovilia could have expected to receive for its coal based on its past earnings. Williams seems to be objecting because Myers based his testimony on the prices Jader received for all the coal it sold, which included coal mined by Lovilia and marketed by Jader pursuant to the Agreement as well as coal Jader mined itself. As Williams points out, the prices Jader received for the coal that it sold do not accurately represent the price Lovilia received or would have received for coal it mined, because the coal Jader extracted from its strip mining operations on the Green and Shawnee tracts generally fetched a lower price than the coal Lovilia extracted through its sub-surface mining operations. Lovilia's contribution to the coal sold by Jader, in other words, was worth more per ton than the average price per ton Jader received for a mixture of coal mined by Lovilia and Jader.

Here, too, we conclude that Myers' testimony satisfies Rule 401's standard of relevance. Williams sought damages for the lost profits Lovilia could have derived from coal left in the ground and rendered inaccessible by the flooding of its mine. The value of coal in the ground is dependent on its market price. Williams' argument implicitly concedes that the prices Jader received for the coal it sold were not wholly unrelated to the price will-

ing buyers would pay for Lovilia's coal alone. The discrepancy between the two goes to the weight to be afforded Myers' testimony concerning coal prices, and was fully explored on cross examination. The district court did not abuse its discretion when it allowed this testimony.

Williams makes a second argument which also relates to Myers' testimony, and which requires a brief discussion of the procedural history of this lawsuit. This action was initially filed in the Central District of Illinois, but was soon transferred to the Southern District. There it was first assigned to Chief Judge Foreman, who presided over discovery and before whom the final pre-trial conference was held. Between the pre-trial conference and the date upon which trial was to begin, Judge Foreman recused himself, and the case was reassigned. Judge Foreman employs a standing order with respect to final pre-trial conferences which requires litigants to identify all exhibits which they plan to use at trial at the conference.

When Myers took the stand during the damages phase of the trial, he was questioned by Jader's counsel concerning the average price per ton of coal Jader received during a two-year period beginning at the start of Jader's 1984 fiscal year, October 1, 1983, and ending at the end of its 1985 fiscal year, September 30, 1985. Jader offered into evidence accounting statements prepared for each of these fiscal years showing the average price per ton it had received in each of these years. Myers was asked how he derived these figures and he made reference to accounting ledgers he maintained showing individual sales made by Jader. Williams' counsel objected that the accounting statements were summaries of voluminous documents, apparently raising the applicability of Federal Rule of Evidence 1006. That rule requires that a party wishing to introduce into evidence a summary of voluminous documents must make the originals available to the other parties for inspection and copying at a reasonable time and place. In response, Myers was allowed to testify using the ledgers themselves, which the district court allowed

into evidence despite the fact that they were not included in the list of exhibits Jader said it would use at the pre-trial conference before Judge Foreman. On appeal, Williams relies on Judge Foreman's rule concerning pre-trial conferences, arguing that Jader never indicated that it would introduce the accounting ledgers at the conference and so should have been barred from introducing them at trial. Williams argues that the district court's decision to allow these ledgers into evidence contravenes Judge Foreman's standing order.

We believe that Williams' reliance on Judge Foreman's rule is unavailing. First, we note that while the specific ground or grounds Williams' counsel gave as the basis for his repeated objections to the admission of the ledgers are shrouded in the mists of colloquy, one that he clearly did not raise was Judge Foreman's rule. "[A] specific objection made on the wrong grounds and overruled precludes a party from raising a specific objection on other, tenable grounds on appeal." 1 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 103[02] at 103-25 to -26 (1990). *See also Hale v. Firestone Tire & Rubber*, 756 F.2d 1322, 1333-34 (8th Cir. 1985) ("An objection at trial on one ground will not enable the objecting party to rely on appeal on other grounds that were not stated in the trial objection."); *Playboy Enters. v. Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.) (where objection at trial was made on hearsay grounds, argument that statement was not credible was waived on appeal), *cert. denied*, 111 S. Ct. 388 (1990); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1440 (9th Cir. 1990) (where objection to admission of photograph at trial was made on grounds of relevance and lack of foundation, argument that photograph was not authenticated is waived on appeal); *Jay Edwards, Inc. v. New England Toyota Distrib.*, 708 F.2d 814, 823 (1st Cir.) (where objection to admission of evidence at trial was made on grounds of relevance, argument that evidence was unduly prejudicial was waived on appeal), *cert. denied*, 464 U.S. 894 (1983). Because Williams did not raise Judge Foreman's rule at trial, and the rule is not a ground "apparent from

context," Fed. R. Evid. 103(a)(1), he may not assert the rule on appeal.

Second, even assuming we should reach the merits of Williams' challenge, the import of his argument seems to be that he was unfairly surprised by the district court's admission of the ledgers despite Judge Foreman's rule that documents not identified at the pre-trial conference may not be introduced at trial. Because we are remanding, however, Williams is now forewarned that Jader may once again seek to introduce the ledgers.[5]

IX. TESTIMONY OF JAY BUCK

Williams' final evidentiary challenge, and the last issue on appeal, concerns the testimony of Jay Buck, a certified public accountant whom Jader presented as an expert witness. Jader's counsel asked Buck a series of hypothetical questions concerning whether Lovilia would have realized a profit from its coal mining operations had they continued beyond September 1985. The capstone of Buck's testimony came when he was asked to compare his estimate of Lovilia's cost per ton of coal mined and the revenue per ton Lovilia would have realized when its coal was marketed by Jader. Buck testified that in 1985 Lovilia would have lost approximately eighty cents per ton of coal sold. He testified that this figure would have risen to almost two dollars per ton in 1986, when coal prices fell further.

On appeal, Williams characterizes Buck's testimony concerning Lovilia's future losses as "speculative," noting that though Buck calculated the declining price of coal using the price per ton received by Jader, his cost figures for Lovilia's mine were based on Lovilia's expenses in its last full year of operations, 1984. According to Wil-

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[5] Williams has not pursued his Rule 1006 challenge on appeal, but we note that the trial record suggests that it might well have been meritorious. On remand, the district court may choose to require Jader to allow Williams the opportunity to examine the ledgers should Jader again desire to introduce them.

liams, this assumption fails to take into account the possibility that Lovilia could have cut its costs in response to the decline in the market price of coal.

Clearly Buck's testimony concerning Lovilia's future potential for profit was relevant to the question of the losses it suffered when its mine was flooded. Just as clearly, the contention that Buck's opinion was speculative goes to the weight jurors might choose to accord his testimony. Williams' lawyer explored various weaknesses in Buck's estimates of future profitability when he cross-examined the accountant, including Buck's failure to recognize the possibility that Lovilia would tighten its belt. Buck could, of course, offer no more than his educated guesses about Lovilia's profitability based on price trends in the coal market and Lovilia's past production costs. However, expert testimony concerning future earnings potential has been allowed in federal courts even where that testimony is based on chancier assumptions than those made by Buck in his appraisal of Lovilia's outlook. *See, e.g., Salas by Salas v. Wang*, 846 F.2d 897, 904 (3d Cir. 1988) (Fed. R. Evid. 702 permits expert economist to testify that child who suffered brain damage during childbirth would suffer damages, over his lifetime, equal to present value of 6.5 million dollars); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 287 (9th Cir. 1975) (not error to permit expert economist to testify as to lost future earnings of railway worker killed in workplace accident). The district court was well within its discretion in allowing Buck to testify concerning his opinion that Lovilia would have lost money had it continued to operate.

Williams also challenges a series of questions put to Buck by Jader's counsel concerning Lovilia's unsuccessful efforts to obtain a loan in early 1985. Jader's counsel asked Buck whether Lovilia would have been able to obtain the loan they were seeking. Tr. 650. Williams argues on appeal that the question was outside the scope of Buck's expertise.

We are unable to agree. "Whether a witness is qualified as an expert can only be determined by comparing the

area in which the witness has superior knowledge, skill, experience or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 211 (7th Cir. 1990). Buck testified that his practice as an accountant includes business planning, a subject which necessarily involves evaluating whether and how much a company will be able to borrow from lenders. Decisions concerning the competency of experts to testify concerning a given subject "are committed to the discretion of the trial judge and its determination will be affirmed unless it is manifestly erroneous." *Id.* (internal quotations omitted). *See, e.g., IMPACT of Northwest Florida v. Firestone*, 893 F.2d 1189, 1195 (11th Cir.), *cert. denied*, 111 S. Ct. 133 (1990); *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 115 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987). Given what we can glean from the record concerning Buck's qualifications, the decision to allow him to testify concerning Lovilia's ability to secure financing was not an abuse of discretion.

X. CONCLUSION

To sum up, we reverse the district court's award of directed verdicts in favor of Jader on Counts I and III of Williams' complaint, and remand for trial on these counts. We affirm the district court's decision to grant Jader directed verdicts on Counts IV and V, as well as its decisions concerning the various challenged evidentiary rulings. We vacate the judgment in favor of Williams on Count II and remand for a new trial on that count. Circuit Rule 36 shall not apply upon remand.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

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No. 90-2333

United States Court of Appeals

For the Seventh Circuit

BILLIE WILLIAMS v. JADER FUEL COMPANY, INC.
Plaintiff *Defendant*

January 10, 1992

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, and the petition for rehearing and suggestion for rehearing *in banc* filed by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 89-5193

In The United States District Court For The Southern District of Illinois

BILLIE WILLIAMS *Plaintiff* **v. JADER FUEL COMPANY, INC.** *Defendant*

FILED May 15, 1990

ORDER

This matter is before the court on the plaintiff's post trial motion for a new trial; oral arguments were heard on this matter on February 9, 1990. The plaintiff's motion for new trial lists thirty four "grounds" in support of his motion, and alleges that the court erred on a number of its rulings.

A request for a new trial is treated as a question of federal law, even in diversity cases. *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989). The federal standard is that "'a new trial can be granted only when the jury verdict is against the clear weight of the evidence'" *Id*, quoting *Davlan v. Otis Elevator Company*, 816 F.2d 287, 289 (7th Cir. 1987). Twenty five of the thirty four grounds listed by the plaintiff are based upon the fact that the court, over objection, allowed testimony or that the court refused to allow testimony. The plaintiff has failed to submit a transcript of these objections and the testimony, however, at the time the testimony was to be presented, the court heard the plaintiff's counsel's reasoning for objecting, and at that time made evidentiary rulings with respect to the testimony. Although some of these rulings may have been erroneous, the court, after careful consideration of the record and trial notes, cannot state that the verdict rendered herein was against the clear weight of the evidence. The jury returned a verdict finding the defendant 70% negligent and the plaintiff 30% contributorily negligent. This verdict, demonstrates that the jury heard and considered the evidence presented by both parties, and its verdict can in no way be construed as against the clear weight of the evidence.

The plaintiff further states, without any authority and/or support for the statement, that the court erred in allowing the defendant's motion for directed verdicts as to Counts I, III, IV, and V of the complaint. At the time of arguments on the motions for directed verdicts, the court carefully analyzed the allegations contained in these counts of the complaint, and stated its reasons for directing verdicts with respect to these counts.

Count I alleges an implied covenant of good faith and fair dealings in the "Contract Mining Agreements" entered into by the parties. Furthermore, this count alleges that the defendant breached this implied covenant through drilling into and entering the underground mine works of the plaintiff; mining the coal from the No. 5 coal seam; and leaving the underground mine works made by the plaintiff exposed and/or unprotected so that the mine works were flooded with water. If indeed a separate cause of action exists for the breach of the implied covenant of good faith and fair dealing, the plaintiff failed to present evidence which would establish this breach. Under the terms of the agreement, the defendant had the right to mine its own coal (See "Contract Mining Agreement (Sub-surface or Underground)" Par. 3, Sec. H). Thus, the terms of the parties' contract allowed the defendant to mine the coal and therefore in mining the coal, the defendant can in no way be said to have breached any implied covenant of good faith and fair dealing.

The plaintiff also seeks a new trial based upon the court's ruling that the defendant was entitled to a directed verdict with respect to Count III of the complaint, which alleged willful and wanton conduct. The record before the court and the evidence produced at trial could clearly establish that the defendant reserved the right to mine the coal, and it did so. There was absolutely no evidence presented to demonstrate that the defendant intentionally cut through into the plaintiff's underground mine works, and therefore the defendant was entitled to the directed verdict granted as to Count III.

Counts IV and V of the complaint alleged, respectively, trespass and willful trespass. As previously stated the defendant retained the right to mine the coal on the land which was leased to the plaintiff. By reason of this retention, the plaintiff was unable to produce any evidence to support the trespass or willful trespass counts, and accordingly, the court granted the defendant's motion for directed verdict.

The plaintiff next urges that the court should grant him a new trial based upon the court's failure to grant plaintiff's motions to strike sub-paragraph (A), (B), (C), and (D) of Affirmative Defense No. 2 and the Answer of the defendant to Count II. Although the plaintiff alleges that the denial of these motions were error, the plaintiff fails to present any new grounds for alleging that these sub-paragraphs of the Affirmative Defense and Answer should have been stricken. At the time the court denied the motions, the court stated its reasons for such denial, and in that the plaintiff has failed to present any new justification for seeking these sub-paragraphs and Answer to be stricken, the court refers the plaintiff to its previous ruling.

The plaintiff also alleges that he is entitled to a new trial in that the court granted tender of defendant's Instruction No. 8, over the plaintiff's objection. This instruction provided:

> In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person whose property is damaged must exercise ordinary care to minimize existing damages and to prevent further damages. If any loss results from a failure to exercise such care, damages cannot be recovered for such loss.

(I.P.I. NO. 33.02.)

In oral arguments, the plaintiff attempted to argue that this instruction was not applicable in this case because contributory negligence was at issue. This argument, however, is flawed because it fails to distinguish what facts constituted evidence contributory negligence, and which facts went to the issue of mitigation.

Evidence was presented that the plaintiff failed to keep the defendant informed as to where its mining was taking place underground, and where the equipment was located. Furthermore, evidence was presented which established that the cut in the mine occurred some time before the storm which caused the damage to the plaintiff's equipment. Although the plaintiff argues that the jury was entitled to consider its contributory negligence twice, i.e., in rendering its verdict and in assessing damages, the plaintiff fails to distinguish between the evidence which established contributory negligence, i.e., the plaintiff's failure to apprise the defendant where it was conducting its mining operations and where its equipment was, and the evidence presented which went to mitigation, i.e., the plaintiff's failure to remove the equipment after the cut and before the storm. Thus, both contributory negligence and mitigation of damages were issues in the trial, and the court is of the opinion that the instruction on mitigation of damages was, in fact, proper.

The jury returned its verdict in favor of the plaintiff, and against the defendant. The jury also found that the plaintiff was 30% contributorily negligent. This verdict clearly reflects the fact that the jury listened to all the evidence presented and arrived at the conclusion that the defendant was negligent, and that the plaintiff was contributorily negligent. This verdict in no way is contrary to the clear weight of the evidence, and accordingly, a new trial is not warranted. *Wassell*, 865 F.2d at 854.

Based upon the foregoing, the plaintiff's post trial motion for new trial must be, and the same hereby is, denied.

IT IS SO ORDERED.

DATED: This 15th day of May, 1990.

/s/ WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

No. 89-5193

In The United States District Court For The Southern District of Illinois

BILLIE WILLIAMS *Plaintiff* **v. JADER FUEL COMPANY, INC.** *Defendant*

FILED December 21, 1989

ORDER

On November 27, 1989 this case was called for trial with the issues of liability and damages bifurcated. A jury was selected and sworn and evidence was presented on the issue of liability. On November 30, 1989 a jury verdict was returned in open court as to the issue of liability wherein the jury found the issue of liability in favor of the plaintiff and against the defendant and also found that 70% of the total negligence was attributable to the defendant and 30% to the plaintiff.

Evidence was then presented on the issue of damages and on December 5, 1989 the jury returned a verdict finding that the total damages were $365,000.00.

IT IS THEREFORE ORDERED that the clerk enter judgment in favor of the plaintiff, Billie Williams and against the defendant Jader Fuel Company in the amount of $255,500.00 and costs.

DATED: This 21st day of December, 1989.

/s/ WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

No. 89-5193

In The United States District Court For The Southern District of Illinois

BILLIE WILLIAMS *Plaintiff* **-v.- JADER FUEL COMPANY, INC.** *Defendant*

FILED December 21, 1989

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, Billie Williams, and against the defendant, Jader Fuel Company, Inc., in the sum of $255,500.00 and costs.

No. 89-5193

In The United States District Court For The Southern District of Illinois

FILED October 4, 1990

PRESENT: The Honorable William L. Beatty, Presiding

ATTORNEY FOR PLAINTIFF: John P. Ewart, John H. Armstrong, George P. Latchford

ATTORNEY FOR DEFENDANT: D. Bradley Blodgett, William F. Trapp, James H. Smith

JURY TRIAL
VOLUME IV
November 30, 1989

. . .

(Whereupon a conference was had in chambers out of the presence and hearing of the jury.)

THE COURT: I think probably the best thing to take up first is the defendant's motion with reference to the various counts. Is that all right with you?

MR. EWART: Yeah, then turn to my motion.

THE COURT: All right. Who is going to do this? You are?

MR. TRAPP: Yes, Your Honor.

THE COURT: Let's talk about one. One is the contractual count based on implied covenant of good faith and fair dealing and all that jazz. What do you say about that?

MR. TRAPP: I would like to adopt the arguments from yesterday and the cases that I cited yesterday, but then I thought of a new argument which is I think perhaps Your Honor has had a chance to read this Dethloff case they decided, I think we're really mixing apples and oranges there because you have got this bad faith trespass or doctrine in there and now

we're talking about bad faith contract. I don't know if this is kind of — I don't know why it was pled that way. It was never pled as bad faith trespass even though we have a recognized doctrine for that.

THE COURT: The problem I have, there is this one case that somebody gave me that said that just good faith and fair dealing, you know, that by itself ain't worth the powder to blow it to hell. You have to come up with something specific. In paragraph 12 he has some subparagraphs there, but it seems to me that, you know, there was either a breach of the contract or there wasn't a breach of the contract. This is — this good faith and fair dealing, as I see it, is kind of a way to, where there wasn't any real specific breach of a written provision in the contract, well then somebody dreamed up this idea to kind of stay in the ball game. But go ahead, I didn't mean to interrupt you.

MR. TRAPP: I have never seen it applied to this type of a case. Sometimes you see it applied to a bank note, like where the bank has a right to deem itself insecure, and I think in those cases the courts have said well, if they are going to deem themselves insecure and set off somebody's account, they have to act in a reasonable manner, and that's where this good faith thing comes in.

THE COURT: I have read this contract very carefully two or three times since we started this case, looking for different things, but as I read this Count One, the guts of it is in this 12, and 12 says that the defendant reached the implied covenant in one or more of the following ways. (a), they drilled into and entered the underground mine works made by the plaintiff in the Number 5 coal seam. How does that, you know, how does that breach this implied covenant of good faith?

MR. EWART: May I ask Mr. Armstrong to respond to that?

MR. ARMSTRONG: The bargain of the parties, Your Hon-

or, was that Lovilia would mine all the coal in the project area, that would exclude Jader from the Number 5 seam.

THE COURT: The contract specifically provides in several places that Jader can mine Seam 5, too, doesn't it?

MR. ARMSTRONG: I don't believe so.

THE COURT: All right. Look at paragraph 3(h), Jader obtains the absolute and sole right to mine by surface or strip or auger mining methods any and all seams of coal on any of the lands covered by this agreement, or on any additional lands. What could be plainer than that? Then there is — it does say they have to give them notice, but they had pulled out of this one.

Now there is another provision, there is a couple of places. In paragraph five it says further, there should be no division or split in the event that coal is mined and removed from the property solely due to the efforts of Jader, which recognizes that Jader may mine some of Seam 5, too. Then in paragraph eight, nor shall Jader be obligated to Lovilia as to any coal which is mined and removed and sold solely through the efforts of Jader. Now what do those provisions mean?

MR. ARMSTRONG: Your Honor, this is a complex document and it's difficult to identify, if this is a grant of a right to remove some coal, which would be just permissive, it could be withdrawn.

THE COURT: I think it's a license is really what it is.

MR. ARMSTRONG: If it is a license, it's an exclusive license. I take the position that it is an exclusive license because the bargain was to mine all of the coal that could be mined by underground means.

THE COURT: Let's assume for the sake of argument, let's assume for the moment that you're correct. How does (a), again, how does (a) apply? Now maybe when you get to (b)

you might have something, but we will get to that in a minute, but as far as (a) is concerned, drilled into and entered the underground mine works made by the plaintiff in the Number 5 coal seam, how does that violate any implied covenant?

MR. ARMSTRONG: They destroyed the integrity of the mine.

THE COURT: You don't say that. Are we supposed to imply that, too? You go on in page thirteen, in paragraph thirteen and you say the plaintiff was deprived of the coal mined from the Number 5 coal seam by the defendant. There is no evidence that they mined any coal from 5. Presumably they did, but there isn't any real evidence. Plaintiff will be prevented from mining coal in the Number 5 coal seam in the future. Are you talking about at this place or over on the north or the east end?

MR. ARMSTRONG: Talking solely about the project area, and their obligation was not to interfere with our mining operations.

THE COURT: But how did they interfere with your mining operations?

MR. ARMSTRONG: They interfered with the mining operations by opening the works.

THE COURT: Are you saying just the opening itself interfered with your mining operations?

MR. ARMSTRONG: There is testimony to that affect, yes, that it reduced or interfered with the ventilation of the mine.

THE COURT: The ventilation would have been easily corrected, I am sure.

MR. ARMSTRONG: The issue is whether they violated the implied covenant.

THE COURT: Well, I have a problem with that. Now, you get down to (c), 12 (c), you get down to the water thing which is the real guts of the thing, I guess. They left the underground

mine works exposed and unprotected and if there is a cause of action here, it seems to me that it's wrapped up in the tort negligence concept that they opened the thing up and that they were negligent in doing so when they knew or should have known that water would have run in and damaged the rest of the mine. I can see that. But if that's the substance of what you're saying in 12 (c), then this count is really repetitious and duplicates Count Two.

I don't see where — see, as I understand this covenant of implied good faith and fair dealing, I don't see that it applies to this situation. I can see, as I interpret this lease, and I may be interpreting it wrong, but as I interpret this, Jader gave you folks a license, and the intent of this lease was that you were going to be permitted to mine all this Seam 5. Well, let's say, although it does not specifically say that, I mean that's kind of the understanding. Assuming for the sake of argument that you bought all the equipment, you opened the mine up, you got started, and then Jader came in and started strip mining Seam 5 in places that you hadn't gotten to yet. Now that, that to me is the implied good faith and fair dealing. That would be a violation of that covenant. I am going to allow the directed verdict as to Count One. Let's get to Count Two.

MR. TRAPP: We adopt the arguments from yesterday which included proximate cause, failure to prove damages, no duty, no breach of duty, because again, we say based on the evidence, we had the right to do what we did. The contract gave us the right to mine the Number 5 coal seam. We had the right to be there, we say that Lovilia did not have the right to be there because they had never been given permission to be at that spot, and that it was not foreseeable that the power source would be destroyed by lightning.

THE COURT: I think I have already indicated my thoughts about this Count Two. I do have a problem with this, with 12 (a) and 12 (b). Again, it seems to me that if there is anything here, the mere opening of the mine didn't really create any

problem. It was the opening of the mine and leaving it open so that water could go in. That's the problem, isn't it?

MR. EWART: Well —

THE COURT: You're on this one? I can't keep you guys straight here.

MR. EWART: I definitely feel that, like any negligence count, as you know, you have subparagraphs. I feel that was a negligent act, and I think there are certain —

THE COURT: What?

MR. EWART: Actual stripping over of the underground mine and opening it, I think that was a negligent act, and also a negligent act then in leaving it exposed with water to come in, they are both separate acts.

THE COURT: Well, okay, but that certainly isn't —

MR. EWART: I recognize (b), You Honor —

THE COURT: I am going to strike (b). Let's go to Three. That's the willful and wanton negligence count.

MR. TRAPP: Did you want me to say anything?

THE COURT: Yeah, what do you have to say about Count Three?

MR. TRAPP: I say that the evidence does not rise to the level of submitting this on a willful and wanton theory. The Court has a special responsibility to screen the claims that a jury should be able to pass on as far as punitive damages are concerned, and the evidence in this case shows that Jader did have the right to mine where they mined, that is the Number 5 coal seam. Jader was the one that held this lease from the owners of the property. There has been no significant activity at the underground mine for over four months. All the employees were laid off. Mr. Williams was not in the area. Wignall was seldom there. The operation had massive debt and the prop-

erty was being repossessed. So, another thing, we admit that we made the cuts, but there is no showing that we intended harm to result from — the harm that has resulted from the cuts. That's the type of showing I think would have to be made to make out willful and wanton activity. In fact, once we realize that the cuts had gone into the underground mine, we lent them pumps to help eleviate that problem, the testimony yesterday about fairly immediate sealing with fire clay to plug the gaps, so I don't think that they have shown any willful and wanton conduct.

THE COURT: Who is going to talk about that one?

MR. EWART: I am going to do that. First, let me say that I think the Court and opposing counsel recognize that we do still have willful and wanton and punitive damages in Illinois.

THE COURT: What was that?

MR. EWART: I believe that it is recognized by opposing counsel that we do have willful and wanton actions with punitive damages in Illinois. He is simply saying that Your Honor has the authority to direct a verdict on that if you think it's appropriate, so I don't think he is disputing — there is the right of that cause of action available.

THE COURT: There is, you can recover punitive damages in the right case, query as to what the nature of the proof is to satisfy the requirement for punitive damages.

MR. EWART: Here is my position. I think it's clearly a jury question, and he can argue the things he wants to argue, and I should be able to argue those things that I did. What we have here, Your Honor, was an intentional act, which is the most severe of the definitions under willful and wanton. You can have a conscious disregard, or an intentional act, and this was an intentional act, and I think I can argue to the jury that this was a willful and wanton act, and I think it's a jury question.

They say they did everything they could, and we don't agree

with that, either. There is quite a dispute in the evidence about that. We contend they promised they were going to do things and didn't do them. Our position is they treated us very shabbily.

MR. TRAPP: Could I say one more thing? I cited to you yesterday Judge Mills' opinion in that Dethloff case where he talked about punitive damages.

THE COURT: At one time Judge Mills may have required some deference on my part because he was on the Appellate Court of Illinois, but since he has been demoted, and is now just like I am, another little old trial judge, I don't know that I have to defer to him, although his opinion was very interesting, and I thought it was a good opinion.

I think the problem we have got here is there has got to be some establishment of the ground rules for punitive damage, and for years, we went along with the Illinois courts saying willful and wanton, willful and wanton, and I used to, back when I was in the state court, I would try to point this out to people and hoping that eventually it would get picked up on by some court, the Appellate Court or the Supreme Court of Illinois, but in this state, we had a long history which I am sure you younger lawyers wouldn't remember, and I doubt if Mr. Latchford may remember it, and you other fellows, but we had the Guest Act in Illinois, and the Guest Act gave rise to the big body of willful and wanton misconduct, that's where we got our law from. And of course, the Guest Act was not a favored son of the courts, and as a result, they were very very free to interpret and water down willful and wanton, to a point of where there was this one Illinois Supreme Court case, an old case, in which they give words that are synonymous with willful and wanton and it covers approximately three fourths of a page in the reported opinion, and I used that opinion one time when I was arguing a case back when I was practicing and wrote all these words down, so it got to a point where willful and wanton didn't mean anything more than negligence. Well,

then we come along with punitive damages, when we saw the rebirth of punitive damages, and we kind of then adopted all that old willful and wanton law, and that wasn't the intent of the courts. I think that in this Kelsey case, the Supreme Court finally recognized that, and then there is another case, a later case than Kelsey that quotes Kelsey, is that Dethloff? No, it's J.I. Case is the case. They say this: Quoting Kelsey, it has long been established in this case that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others, and what they have done, they have tied these things together, and I think it indicates that what Court is now saying is that it can't just be the ordinary little old garden variety willful and wanton misconduct, a la Guest Act. It has to be something that is really willful and wanton. The evidence in this case, I don't think, rises to that level. The evidence is that they had certainly done all the mining that they were going to do at that western end. The roof was going bad, the hill was sloping down, so that they had less overburden. They were having water problems, but the real problem was the fact that the coal was, as I understand the terminology, was starting to out crop, the hill is coming down, and the coal is coming up, and they had abandoned that end of the mine, and they were going to another place, and I don't think there is any dispute about that. Now, there may be an argument that maybe they were going to come back and pull out the pillars or whatever they do, but there is no evidence that they were ever going to go back to active mining in that area, is there Mr. Ewart?

MR. EWART: And that's not the point.

THE COURT: I know. So what?

MR. EWART: That may not — were we going to pull in that area?

MR. LATCHFORD: Yes, yes.

THE COURT: Maybe they are going to pull but they weren't going to go back to active mining in that area.

MR. EWART: That is a form of active mining.

THE COURT: Well, it may be. They had not operated in April, May, June, July, at least four months, they hadn't operated at all. I just don't think that this evidence rises to a level that would warrant a jury finding of punitive damages. Now, what do you say?

MR. EWART: I disagree. I think it's a jury question. With all due respect, I think it would be hard to find a case —

THE COURT: Where is there any evidence that indicates that this was done with any thought to harm or malice or intentional, intending to do any damage to them?

MR. EWART: It demonstrates that Ed Downen and Jader put first, put themselves first and simply disregarded our rights. Your Honor, I don't see why it makes any difference if we weren't in the mine for a period of time. It was still an open mine being ventilated, and what right does he have to come in and open it up, causing all these safety hazards, and basically flooding the mine, is our position, and we think there is good evidence to support that, and destroyed the equipment.

THE COURT: Fine. Compensatory damages can be awarded for that that will adequately compensate you for that. We're talking about punitive damages here.

MR. EWART: I just feel there is enough there for punitive. If a jury would agree —

THE COURT: I am going to allow defendant's motion on that. Then we go to Count Four. What do you say about Count Four?

. . .

EXHIBIT A

CONTRACT MINING AGREEMENT
(SUB-SURFACE OR UNDERGROUND)

THIS AGREEMENT made as of the date hereinafter set forth, confirming the oral agreement of the parties, by and, between JADER FUEL COMPANY, INC., A Delaware Corporation, by its duly authorized officers, whose address is P.O. Box 620, Shawneetown, Illinois 62984 (hereinafter referred to as "JADER"), and BILLIE WILLIAMS and TOM WIGNALL, JR., jointly and severally, d/b/a Lovilia Coal Company, whose address is P.O. Box 425, Shawneetown, Illinois 62984 (hereinafter referred to as "LOVILIA").

WITNESSETH THAT:

WHEREAS, JADER possesses and controls certain tracts of land and coal leases in Gallatin County, Illinois; and

WHEREAS, LOVILIA is engaged in the business of mining and recovering coal by sub-surface or underground mining processes; and

WHEREAS, the parties desire to enter into an agreement whereby JADER shall permit LOVILIA to mine and remove the sub-surface or underground coal, by methods other than strip mining, from the lands and to the extent as hereafter set forth;

NOW, THEREFORE, the parties hereto agree and contract as follows:

1. PROJECT AREA. The lands which are the subject of this agreement are certain lands, a portion of which is commonly known and referred to as the "Green Lease", more particularly described in the Exhibit "A" attached hereto and incorporated herein by reference.

Said lands have been permitted for surface mining and surface mining has been and is being conducted by JADER on

said lands. Such lands are presently available, or shall be made available, for sub-surface or underground mining, and LOVILIA may commence work thereon upon execution of this agreement, or as soon thereafter as all necessary permits or certificates of approval of every federal, state or local regulatory agency whose permission or approval is required, have been obtained. The portion of the Green Lease described on the attached Exhibit "A", or such other lands as may be sub-surface or underground mined by LOVILIA, are herein referred to as the project area. JADER does not guarantee the quality or quantity of the coal available or to be mined in the project area.

2. OBLIGATIONS. JADER presently has a surface mining permit issued by the State of Illinois Department of Mines and Minerals. LOVILIA will be permitted to conduct certain of its mining operations within the scope of the JADER permit. However, LOVILIA agrees to take any and all actions necessary to obtain such additional underground permitting requirements as shall be required. The parties have agreed and believe that the same may be done by an amendment or addendum to the surface permit of JADER. The parties agree to cooperate to the end of obtaining all necessary permits for underground mining on the property covered by this contract mining agreement, in addition to surface mining, which has been, and shall continue to be, conducted by JADER, alone. The parties further agree to amend and revise existing permits when required as follows:

A. To provide for changes in operation and/or site condition.
B. As required by revised rules and regulations.
C. As required or directed by any regulatory agency.
D. To permit underground or sub-surface mining for LOVILIA.

Further, should JADER and LOVILIA mutually agree, JADER will attempt to revise the existing permit to provide for

additional permit areas. Provided, however, that JADER shall have no liability for economic hardship suffered by LOVILIA due to delays in operation and/or increased cost which may result from permit amendments or additions or the application process.

3. OBLIGATIONS OF JADER. JADER reserves the number six (# 6) seam of coal as to all lands covered by this agreement. JADER agrees, however, as part of the consideration herein stated to perform and conduct the following:

A. JADER shall open the pits and construct or make a face to enable LOVILIA to have access to the underground coal without the necessity of vertical shaft mining which shall not be permitted, in any event.

B. JADER shall see to the reclaiming of the area following the conclusion of mining efforts by LOVILIA pursuant to this agreement.

C. JADER shall arrange for transportation of the coal recovered to market from and after the point of loading by LOVILIA.

D. JADER shall handle the marketing of the coal recovered by LOVILIA and shall select the place and timing of marketing said coal.

E. JADER shall reserve the absolute and sole right to decide whether or not additional mining shall be conducted beyond the scope of the number five (# 5) and number two (# 2) seams of coal on the lands described herein as Exhibit "A" (Green Lease).

F. JADER shall conduct or arrange for the washing of the coal, if desirable.

G. JADER shall determine and pay royalties pursuant to lease or other arrangement which may have been reserved or assigned or transferred to other parties.

H. JADER retains the absolute and sole right to mine by surface or strip or auger mining methods any and all seams of coal on any of the lands covered by this agreement, or on any additional lands which JADER may now or hereafter own or control.

I. JADER shall give a notice to proceed to LOVILIA as to any mining operation concerning any certain seam of

coal on any certain tract of land if it elects not to attempt to further remove coal from said property by the strip or surface mining techniques employed by JADER.

J. JADER shall arrange for and keep posted sufficient bond or financial assurance to satisfy the permitting and reclaiming obligations pertaining to the mining operations to be conducted pursuant to this agreement.

4. OBLIGATIONS OF LOVILIA. LOVILIA agrees to do each and all of the following:

A. To mine the underground or sub-surface coal, in the number five (# 5) and number two (# 2) seams on and under the lands described on the attached Exhibit "A" (Green Lease).

B. To mine such additional seams of coal, beyond the number five (# 5) and number two (# 2) seams, on the lands described on the attached Exhibit "A", as and when directed by JADER, or when so permitted and authorized.

C. To load at the mine site onto truck, train, belt or conveyor, and to furnish such equipment, not limited to an endloader, and related equipment, necessary to load the coal for transportation purposes to the washing site of other original destination.

D. To furnish such employees, agents, and tools and equipment as shall be necessary to conduct the sub-surface or underground mining operations, and loading operation, solely at LOVILIA expense.

E. To furnish and provide all wages and employee-benefits for any employees of LOVILIA, and workmen's compensation and black lung insurance pertaining to LOVILIA employees.

F. To excavate, mine and remove all merchantable, sub-surface or underground mineable coal, to the extent that the same is permitted under leases or assignments by the owners thereof, and only to such extent. Further, to remove all such coal as can be practically, economically, and profitably mined by LOVILIA from the project area.

G. To pay any and all fines levied by any governmental

agency occasioned by action or inaction of LOVILIA and will protect and indemnify JADER for any and all fines and violations which may be incurred by virtue of the LOVILIA mining operation under the permits and contract mining agreement herein.

H. LOVILIA will maintain all required operational records, including, but not limited to: Disturbed area maps, mine out area maps, topsoil depth records, blasting records, explosive inventory records, production records, labor records, insurance records, and such other records as may be required by any governmental or regulatory agency.

I. LOVILIA will perform such tests as are reasonably required for the operation of a sub-surface or underground mine and furnish and maintain records and proof thereof.

J. LOVILIA will provide such certificate of insurance as shall reasonably assure compliance with the rules and regulations of the Department of Mines and Minerals, and evidence full coverage as to workmen's compensation and black lung coverage.

K. LOVILIA shall take and assume responsibility for the maintenance of conformity with any and all leases under which it is mining, and shall at all times comply with the limitations, restrictions, and covenants therein, including, but not limited to, those items set forth in the "Green Lease" which is a certain lease dated June 20, 1980 between I. F. Green, et al. and Downen Enterprises, a memorandum of which was recorded as documents # 25749, October 19, 1980 at Miscellaneous Book 25, page 123 in the Gallatin County Recorder's Office. Said lease as amended and memorandum thereof and the restrictive covenants and agreements of same are incorporated herein as part of the limiting terms and conditions between the parties hereto. LOVILIA shall at all times comply with the covenants and provisions thereof, as amended from time to time.

5. COMPENSATION. As part of the agreement of the parties herein JADER shall handle the marketing and collection of funds for sale of the coal mined by LOVILIA. For the services and agreements herein set forth JADER shall be en-

titled to retain for its own purposes the sum of thirty percent (30%) of the net sale price of the coal, and any premiums of penalties pertaining thereto. The remaining seventy percent (70%) of net sales price of said coal mined by LOVILIA shall be paid over to LOVILIA as and when collected, and promptly thereafter, subject to adjustment for LOVILIA'S prorata share of any premiums or penalties pertaining thereto. For purposes of this agreement and paragraph the net sales price shall be deemed the equivalent of the mine site price. Such is considered to be the gross sales price of the coal less deductions for shipping, commissions, barging, and transportation, which shall be first paid in full before payment and division among the parties hereto. Both parties shall attempt to keep true and correct records of the coal mined, removed, and sold from the premises, and each party shall at all reasonable times have the right to inspect the production and price records of the other. JADER shall, upon reasonable request, furnish copies of truck, barge, or railroad weight load tickets or other documentation upon which the basis of payment for the coal shall be determined. The parties shall truly and faithfully account to the other. All statements rendered by JADER for earned royalties or proceeds payable to LOVILIA shall be conclusive and final six (6) months from the time of the rendition and payment as to the quantity of coal mined, removed and sold, and royalty due or payable during such period unless written objection shall be made by LOVILIA within such period.

The parties have agreed hereto that the 70/30 split and division of compensation above set forth shall apply for all coal mined and sold from the property. Such split shall also apply in the event of removal and sale of raw coal or unwashed coal from the property. Provided, however, no raw coal or unwashed coal shall be marketed from the property at less than $24.00 per ton without the subsequent express agreement of both parties and renegotiation as to the division and payment of expenses and compensation. Further, there shall be no divi-

sion or split in the event that coal is mined and removed from the property solely due to the efforts of JADER.

6. COMMENCEMENT. LOVILIA will commence and continue mining operations as soon as possible, but in any event within one hundred twenty (120) days from the date hereof and shall thereafter mine the project area on a continuing and continuous basis until the project area shall have been completely mined. Reasonable extension shall be considered and granted, where appropriate, by JADER in the event of inclement weather sufficient to prevent mining, or strikes, wars, or other matters completely beyond the control of LOVILIA, or of JADER.

7. EXPENSES. The parties have agreed to share certain threshold and continuing expenses on the basis of seventy percent (70%) contribution by LOVILIA and thirty percent (30%) contribution by JADER. These items include:

A. The cost of furnishing and obtaining electric power to the property and mining site through the Rural Electric Association, Southeastern Illinois Electric Cooperative, with a total cost estimated of $40,000 to $50,000.
B. All expenses and fees pertaining to marketing the coal mined pursuant to this agreement.
C. All brokers fees, costs or commissions payable in connection with the sale and marketing of coal mined pursuant to this agreement.
D. Penalties and premiums pertaining to the sale of coal.
E. Such other extra items which may benefit the both of the parties hereto and be subsequently agreed upon by them.

8. RIGHT OF FIRST REFUSAL. In addition to the project area which is the subject of this contract mining agreement as described on the attached Exhibit "A" hereto (Green Lease) JADER does hereby grant a right of first refusal for contract mining operations and as to the sub-surface or underground coal on certain lands adjoining said Green Lease, being eighty (80) acres lying immediately to the West thereof, commonly

known as the "Shawnee National Forest property". Said property is more fully and completely described on the attached exhibit designated as Exhibit "B". In the event that JADER shall obtain and acquire mining rights, whether by lease or ownership on said property, it agrees to designate or grant in favor of LOVILIA the right of first refusal to mine and remove the sub-surface or underground coal from said property on terms and conditions similar to those stated herein. Nothing herein, however, shall be construed or interpreted to as to obligate JADER to allow mining or removal of anything from any of the properties covered by this agreement other than the number five (# 5) and number two (# 2) seams of coal from the property herein described on Exhibit "A", and only such property; nor shall JADER be obligated to LOVILIA as to any coal which is mined and removed and sold solely through the efforts of JADER. JADER may agree and advise LOVILIA to commence or undertake further operations as to the sub-surface or underground coal, including the number five (# 5) and number two (# 2) seams of coal on the adjoining Shawnee National Forest Service property, if acquired. In the event that JADER shall so elect it shall notify LOVILIA who shall proceed with said mining operations and shall maintain and continue the same on a continuing and continuous basis until the entire designated area shall have been completely mined and all merchantable coal which can be practically, economically and profitably mined by sub-surface or underground mining methods permitted herein, shall have been removed. Failure to so proceed after permission, direction or designation by JADER shall invalidate the right of first refusal herein granted in favor of LOVILIA.

9. COAL SEVERANCE TAX. The parties acknowledge and agree that there is presently no coal severance tax payable because of the mining and removal of the coal from the properties as contemplated by this agreement. In the event that such should become law and an obligation of the parties herein, the cost of said tax shall be adjusted and paid by the parties on the

basis as the other shared and prorated expenses as follows: Seventy percent (70%) by LOVILIA, thirty percent (30%) by JADER.

10. REPORTS AND RECORDS. The parties shall cooperate toward the preparation of all reports and maintenance of all records required by governmental or regulatory agencies.

11. COMPLIANCE WITH LAWS AND LEASES. In all operations hereunder, LOVILIA shall comply in every respect with all applicable laws and regulations of the State of Illinois and of the United States regarding the management and operation of coal mining properties, and with all applicable provisions respecting mining operations that may be contained in any and all coal mining leases to JADER or prior parties in title. Such obligation shall include compliance with any limitations contained therein. Reference has previously been made to the terms and conditions of the Green Lease and LOVILIA is bound by the terms and conditions thereof and agrees to comply with same. JADER will be responsible for all payments due to landowners, lessors, assignors, or prior parties in title.

12. INDEMNIFICATION OF JADER. LOVILIA agrees to indemnify JADER, its successors and assigns, from any loss, damage, cost, charge, or expense, whether direct or indirect, and whether to persons or property, to which JADER, its successors or assigns, may be subjected by reason of any action, omission, or default of LOVILIA or any subcontractors of LOVILIA or any of LOVILIA'S or its subcontractors, officers, agents, or employees. LOVILIA shall be considered an independent contractor hereunder and shall not be considered as an employee or agent of JADER for any purpose. Likewise, this agreement shall not be considered or construed as an agreement of partnership between the parties hereto.

13. NOTICES. Any and all notices provided for herein shall be in writing. Notices to JADER may be made by personal service to an officer of the corporation or by certified

mail, return receipt requested, to JADER FUEL COMPANY, INC., P.O. Box 620, Shawneetown, Illinois 62984.

Notices to LOVILIA may be made by personal service on either of the partners or principals of LOVILIA, or by certified mail, return receipt requested, to LOVILIA COAL COMPANY, Box 425, Shawneetown, Illinois 62984.

14. TERMINATION. This agreement shall be terminated and shall terminate automatically by its own terms, upon the passage of the first of the following events:

A. Automatically, upon the passage of ten (10) years from the date of this agreement.

B. In the event that there has been, for a six (6) month period, no mining action of a continuous nature directed toward the production and marketing of underground or sub-surface coal from said property, unless such agreement shall be extended during said six (6) month period, or thereafter, by the subsequent written agreement of the parties.

C. In the event that JADER shall refuse, without reasonable cause, to market coal mined and removed from the property for a continuous period of six (6) months. (In the event that JADER shall continue the refusal to market coal from said property for a period of six (6) months after written notice from LOVILIA and request to market said coal, LOVILIA may advise JADER in writing of its intention to consider this lease at an end. The six (6) month period shall not begin to run until written notice shall be given by LOVILIA to JADER. During such six (6) month period JADER shall be permitted to continue to market the coal and such shall invalidate the notice or statement of intention to terminate the contract. If JADER shall persist in failure to market the coal for a period of six (6) months after receipt of the written notice of intention to terminate by LOVILIA, then, and only in such event, LOVILIA shall be permitted to market the coal, itself, but shall be obligated to pay a royalty to JADER of Three Dollars ($3.00) per ton. Likewise, in such event, this contract

mining agreement shall be considered terminated and each party released from the obligations herein stated.)

15. GREEN LEASE. The parties hereto recognize that the original lease agreement herein referred to as the Green Lease contains restrictions which do not permit sub-surface or underground mining. Negotiations have been conducted and an amendment number two to the Green Lease is being circulated which will permit the mining and removal of coal from the Green Lease property by sub-surface or underground methods. The parties hereto expressly agree that the terms and conditions of this contract mining agreement are premised on the assumption that said amendment will be signed and authorized by the owners of the coal. In the event that such should not be the case, and through reasonable negotiation the right to mine and remove the sub-surface or underground coal cannot be obtained, then this contract shall be terminated, cancelled, and considered invalid as between the parties hereto. Each understands this limitation and condition and agrees to proceed hereafter at their own risk.

16. RECORDING. The parties hereto recognize that each prefers that the terms and conditions of this agreement not be made public. Each will attempt to divulge the contents and information, terms and conditions, of this agreement, only to such other parties who have an absolute need to know. The parties shall endeavor not to record this full and complete contract mining agreement. The parties agree that a short form notice and memorandum of this agreement may be recorded in lieu thereof and shall be executed by the parties simultaneous herewith.

17. NON-COMPETITION. In addition to the other agreements herein contained, and for part of the total consideration herein, LOVILIA, for itself, and on behalf of each of the principals or partners herein, and its successors or assigns, if any, agrees not to compete, nor to engage, in the purchase, acquisition, leasing, exchange of, nor sale, of coal or mineral

rights (either surface, or sub-surface or underground), of any sort, nor in the contracting, offering, or negotiation or attempt at any such action pertaining to coal or mineral rights, in the area including Gallatin and Saline Counties, in the State of Illinois, and any and all counties in the State of Illinois contiguous or adjacent thereto for and during the term of operation and mining under this contract mining agreement, or for a period of ten (10) years from the date of this agreement, being until the date of December 1, 1991, whichever date or time shall be later. LOVILIA acknowledges that JADER and its related entities now own and control certain coal and mineral rights in the counties aforesaid, and that they have plans or intentions for the further acquisition, purchase, or leasing, of other coal or mineral rights within said area, and LOVILIA shall in no way compete, nor offer to compete, in the negotiation or purchase of any leasing or acquisition of coal or mineral rights (either surface or sub-surface) during the term herein set forth, without the express written consent of JADER, which may be withheld, with or without cause or reason; nor shall LOVILIA compete during such time and for such purpose with any of the JADER subsidiaries or related entities or businesses with which JADER may now have or hereafter undertake to have a business relationship.

18. ENTIRE AGREEMENT — NO ORAL MODIFICATION. This contract mining agreement represents the entire agreement between the parties. No additional oral agreements respecting this contract mining agreement have been made. This agreement may be amended or modified only by a writing executed by the appropriate corporate officers of JADER, and by a partner or principal of LOVILIA.

19. BINDING EFFECT. This agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.

IN WITNESS HEREOF the parties have executed this agreement this 1st day of December, 1981.

JADER FUEL COMPANY, INC.
/s/ Robert P. Downen, President

ATTEST:
/s/ Edward W. Downen, Secretary

LOVILIA COAL COMPANY
/s/ Billie Williams

ATTEST:
/s/ Tom Wignall, Jr.
Individually and as Partners, d/b/a Lovilia Coal Company

(SEAL)

STATE OF ILLINOIS)
COUNTY OF GALLATIN) SS:

I, the undersigned Notary Public, in and for said County and State aforesaid, DO HEREBY CERTIFY THAT Robert P. Downen, President and Edward W. Downen, Secretary of JADER FUEL COMPANY, INC., personally known to me to be the same persons whose names are subscribed to the foregoing instrument, as having executed the same, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notarial Seal this 1st day of December, 1981.

/s/ Hazel A. Pate
Notary Public

STATE OF ILLINOIS)
COUNTY OF GALLATIN) SS:

I, the undersigned Notary Public, in and for said County and State aforesaid, DO HEREBY CERTIFY THAT Billie Williams and Tom Wignall, Jr., individually and as partners, d/b/a LOVILIA COAL COMPANY, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, as having executed the same, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notarial Seal this 1st day of December, 1981.

/s/ Pamela J. Gowan
Notary Public